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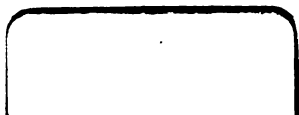


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Professor Austin D. Scott.

Received JAN 23 1919



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A SOURCE-BOOK

OF

MILITARY LAW

AND WAR-TIME LEGISLATION

PREPARED BY THE
WAR DEPARTMENT COMMITTEE ON EDUCATION AND SPECIAL
TRAINING

1919
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PREFACE

1. This book is meant to supply, together with the Manual for Courts-Martial, materials for the course in Military Law and War-Time Legislation, as planned by the War Department Committee on Education and Special Training, in the approved program for law schools having units of the Students Army Training Corps, U. S. A.

Courses on those subjects are prescribed. This book, however, is not prescribed. It is merely the result of an attempt by one member of the Committee to ensure that students and instructors should find available a collection of select sources; for no other suitable volume was known to be in print. The Manual for Courts-Martial is expected to serve for the introductory course of the first quarter; this volume will serve for the two courses that follow in the second quarter.

2. The West Publishing Company of St. Paul with ready patriotism and courtesy agreed to manufacture the book promptly in readiness for the foregoing use.

Mr. Merton L. Ferson, Dean of the Law Department of George Washington University, kindly undertook the task of making the selection of pre-war judicial opinions.

The two books may of course be found useful by lawyers and others now entering on the professional study of Military Law. The undersigned, having done what seemed his duty in assisting the work of the Students Army Training Corps, did not deem it necessary to restrict the book to their use; he has therefore presented the copyright to the publishers for other use as they see fit.

3. The scope of what is called Military Law has always been indefinite; and its topical analysis has varied with different authors. For pre-war law, the division adopted in Part I, B, of this volume seems to present those distinctions which concern substantially different principles and lines of precedents, viz.:

(I) *Military and Civil Jurisdiction Contrasted*. Here the emphasis is on jurisdiction and powers; i. e., the extent to which the civil suffers an inroad from the military. This involves the subsidiary contrasts between Federal and State powers; between military and civil court jurisdiction in time of peace; and between the powers and the limitations of the executive.

(II) *Military Persons; their Special Rights and Liabilities before the Civil Courts*. This involves the privileges or immunities of a military person as to torts and crimes; the application of principles of agency to commanded acts; and a few other related principles.

(III) *Government's Liability for Contracts and Torts*. This is merely the application of some general principles to acts done by military officials in particular.

(IV) *Effect of War on Contracts and other Relations.* This is not in strictness military law, but war law.

(V) *Army Organization and Administration.* This is what might be called internal military law; i. e., the principles that govern the status of military persons so far as the Legislature and the Courts have formulated and controlled them—the remainder of this extensive subject being left for control by regulations of the military authority itself.

(VI) *Army Discipline.* This represents merely a large but distinctive portion of the foregoing body of rules, and is covered by the Articles of War and the Manual for Courts-Martial.

There remain, of course, the

(VII) *Rules for Land Warfare;* i. e., for the governance of military persons in their relations with all other persons when conducting military operations in time of war. As these rules of national law are supposed to represent the customs of so-called international law, they are commonly dealt with in books on that subject, and are not covered here.

The present volume, therefore, covers only the first five of the above topics. Those five represent no scientifically homogeneous group of legal principles, but only those topics of law which affect military persons and others who have relations with them.

4. Part II contains sources for the study of War-Time Law. As this material consists partly of statutes ranging over a variety of topics, no topical division was possible. Both Parts, therefore, were frankly arranged by chronology and by the kinds of sources, rather than by topics; the whole material being divided into Pre-War Legal Sources and War-Time Legal Sources.

This, after all, is more suitable for purposes of study. Part I places the reader in possession of the main outlines (with the Manual for Courts-Martial) of Military Law as we had it before we came into the war. Part II then shows us the main changes introduced by war legislation, into both military law and civil law. Part I alone would have left the student behind the times; Part II would be largely unmeaning without Part I.

In using the book, the last two portions, viz. Federal Judicial Opinions, and Opinions of the Judge Advocate General, may best be used as exercises for applying the entire mass of the preceding material. The selected Opinions of the Judge Advocate General present a series of problems running over almost the whole gamut. There is scarcely a legal principle or a statute that does not come into play in one or another of these opinions. They reflect faithfully the present day aspect of military law in its practical operation.

5. Military Law has of course no intrinsic connection with War-Law. The latter is simply such alterations of the civil law as are made for the duration of a war. Apart from a few distinctly military topics, e. g., martial law, and land warfare rules, it concerns chiefly the altered legal rules for civil relations. Scientifically it might have no place here.

Why has Part II, on War-Time Legal Sources, been included? Because it is impossible for any lawyer to avoid educating himself in the war-law of to-day, and because it is impracticable to disentangle its military and its civil aspects. Theory here must yield to facts; else it would become pedantry. The facts are that this is a nation in arms; that the war laws have changed parts of both the military law and the civil law; that every department of the Government and every civil interest comes into contact with this war law in both aspects; and that no intelligent lawyer can wish to remain uninformed as to any important part of it. The spirit of the times demanded, therefore, that a volume intended to provide legal materials for study by those who will enter the legal profession on their return from military service should endeavor to keep them abreast of their profession and should introduce them to the general legal atmosphere of war times.

No lawyer who is familiar with this material can doubt the compelling propriety of this. The whole drama of the war, in its legal aspect, proceeds across the stage, as we follow the statutes here collected. And the young lawyer-soldier who uses this volume, it is hoped, will find revealed to him, as a soldier, the deep interest of military law, and, as a lawyer, the far-reaching portent of the new war law.

JOHN H. WIGMORE.

TABLE OF CONTENTS

SUMMARY OF CONTENTS

PART I. PRE-WAR SOURCES OF MILITARY LAW

	Page
A. LEGISLATIVE ENACTMENTS.....	1
B. JUDICIAL OPINIONS.....	56

PART II. WAR-TIME SOURCES

A. LEGISLATIVE ENACTMENTS.....	384
B. REGULATIONS AND GENERAL ORDERS.....	604
C. FEDERAL JUDICIAL OPINIONS (1917, 1918).....	617
D. JUDGE ADVOCATE GENERAL'S OPINIONS.....	688

PART I. PRE-WAR SOURCES OF MILITARY LAW

A. LEGISLATIVE ENACTMENTS

	Page
1. MUTINY ACT, 1688.....	1
2. CONSTITUTION OF THE UNITED STATES, 1787.....	6
Article I. Powers of Congress.....	6
Article II. Powers of the President.....	6
Article III. Judicial Power.....	7
Article IV. Protection of States against Invasion.....	7
Amendments	7
3. ARTICLES OF WAR (1775-1916).....	8
4. REVISED STATUTES OF THE UNITED STATES, 1878.....	34
Sec. 214. Department of War--Secretary of War.....	34
Sec. 216. Duties of the Secretary of War.....	34
Sec. 217. Secretary of War custodian of department property, etc.	34
Sec. 1094. Composition of the Army.....	34
Sec. 1114. Brigades and divisions.....	35
Sec. 1115. Number of enlisted men.....	35
Sec. 1116. General qualifications.....	35
Sec. 1117. Enlistment of minors.....	35
Sec. 1118. Persons not to be enlisted.....	35
Sec. 1119. Term of enlistment.....	35
Sec. 1133. Duties of Quartermaster's Department.....	35
Sec. 1146. The ration.....	35
Sec. 1147. Coffee and sugar commuted.....	35
Sec. 1148. Sugar and coffee in kind.....	35
Sec. 1149. Sales of tobacco.....	35
Sec. 1152. Regulations of supplies.....	36
Sec. 1164. Supplies	36

4. REVISED STATUTES OF THE UNITED STATES, 1878 (Continued)		Page
Sec. 1169.	Right of command.....	36
Sec. 1193.	Chiefs of corps and departments, how selected.....	36
Sec. 1195.	Signal service, rank of chief.....	36
Sec. 1198.	Bureau of Military Justice, organization.....	36
Sec. 1199.	Duties of judge-advocate-general.....	36
Sec. 1200.	Judge-advocates	36
Sec. 1201.	Duties of judge-advocates.....	36
Sec. 1202.	Witnesses compelled to attend.....	36
Sec. 1203.	Reporter	36
Sec. 1204.	Promotions, general rule.....	37
Sec. 1205.	In case of transfers from the line.....	37
Sec. 1209.	Brevets	37
Sec. 1210.	Date of brevet commission.....	37
Sec. 1211.	Assignment to duty according to brevet rank.....	37
Sec. 1212.	Uniform and title.....	37
Sec. 1219.	Time of actual service considered in fixing rank.....	37
Sec. 1222.	Accepting or holding civil office.....	37
Sec. 1229.	Officers dropped for desertion.....	37
Sec. 1230.	Officer dismissed by President may demand trial.....	38
Sec. 1232.	Enlisted men not to be used as servants.....	38
Sec. 1237.	Exemption from arrest.....	38
Sec. 1241.	Sales of stores.....	38
Sec. 1242.	Arms and accouterments in possession of persons not soldiers	38
Sec. 1243.	Retirement upon officer's own application.....	38
Sec. 1244.	After 45 years or at the age of 62.....	38
Sec. 1245.	For disability.....	38
Sec. 1257.	Vacancies by retirement.....	38
Sec. 1262.	Service pay.....	39
Sec. 1263.	Not to exceed forty per centum on yearly pay.....	39
Sec. 1265.	Pay during absence.....	39
Sec. 1269.	Allowances	39
Sec. 1270.	Allowance of fuel, quarters, and forage.....	39
Sec. 1291.	Soldiers' pay not assignable.....	39
Sec. 1292.	Volunteers	39
Sec. 1293.	Rations of enlisted men.....	39
Sec. 1296.	Clothing, prescribed by the President.....	39
Sec. 1304.	Accounting for deficiencies.....	39
Sec. 1625.	Who to be enrolled in the militia.....	39
Sec. 1626.	Enrollment, by whom.....	40
Sec. 1627.	Notice of enrollment.....	40
Sec. 1628.	Arms and accouterments.....	40
Sec. 1639.	Care of the wounded.....	40
Sec. 1641.	Privileges of certain corps.....	40
Sec. 1642.	Orders of President in case of invasion.....	40
Sec. 1643.	Militia, how apportioned.....	41
Sec. 1644.	Subject to rules of war.....	41
Sec. 1658.	Courts-martial, how composed.....	41
Sec. 1977.	Equal rights under the law.....	41
Sec. 1979.	Civil action for deprivation of rights.....	41
Sec. 1980.	Aid of the military and naval forces.....	41
Sec. 3709.	Advertising for contracts.....	41
Sec. 3714.	Contracts under direction of Secretary of War.....	41
Sec. 3732.	Unauthorized contracts prohibited.....	42

TABLE OF CONTENTS

ix

4.	REVISED STATUTES OF THE UNITED STATES, 1878 (Continued)	Page
	Sec. 3744. Formal written contracts—Returns Office.....	42
	Sec. 3748. Sale, barter, etc., of clothing, arms, etc., furnished to soldiers	42
	Sec. 5297. Insurrection against a state.....	42
	Sec. 5298. Insurrection against the government of the United States	42
	Sec. 5299. Power to suppress insurrection.....	43
	Sec. 5300. Proclamation to insurgents to disperse.....	43
5.	CRIMINAL CODE, ACT OF MARCH 4, 1909.....	43
	Sec. 9. Accepting foreign commission.....	43
	Sec. 10. Enlistments	43
	Sec. 13. Military expedition or enterprise.....	44
	Sec. 14. Use of the military force.....	44
	Sec. 15. Same	44
	Sec. 18. Citizens of a foreign state.....	45
	Sec. 22. Presence of troops at election.....	45
	Sec. 23. Preventing voting.....	45
	Sec. 24. Attempt to fix qualification of electors.....	45
	Sec. 25. Interference with an officer of election.....	45
	Sec. 35. Purchase of United States property from soldiers.....	45
	Sec. 36. Stealing government property.....	46
	Sec. 38. Aiding or abetting with intent to defraud any captor or claimant of property captured as a prize.....	46
	Sec. 46. Robbery, larceny, etc.....	46
	Sec. 47. Embezzlement, stealing, etc.....	47
	Sec. 48. Receiving stolen property.....	47
6.	ACT OF JUNE 18, 1878.....	47
	Sec. 15. Restriction upon the use of military force.....	47
7.	ACT OF MARCH 3, 1885.....	47
	Claims for property lost or destroyed.....	47
8.	ACT OF AUGUST 1, 1894.....	48
	Sec. 2. Age, citizenship—Term of enlistment.....	48
9.	ACT OF APRIL 22, 1898.....	48
	Sec. 1. Composition of national forces.....	48
	Sec. 2. Organized and active land forces.....	48
	Sec. 3. Regular Army.....	49
10.	ACT OF FEBRUARY 2, 1901.....	49
	Sec. 1. Composition of Regular Army.....	49
	Sec. 36. Enlisted strength of the Army.....	49
11.	ACT OF FEBRUARY 14, 1903.....	49
	Sec. 1. Establishment of General Staff Corps.....	49
	Sec. 2. Duties of	49
	Sec. 4. Duties of the Chief of Staff.....	50
12.	ACT OF MAY 27, 1908.....	50
	Sec. 1. Composition of the organized militia.....	50
	Sec. 2. Organization	50
	Sec. 3. Calling forth the militia.....	50
	Sec. 4. The same—Term of service.....	51
	Sec. 5. Enlistment and muster.....	51
	Sec. 6. Membership of courts-martial.....	51
13.	ACT OF FEBRUARY 18, 1909.....	51
	Sec. 50. Parades, etc., to have right of way.....	51
14.	ACT OF MARCH 1, 1911.....	51
	Discrimination against persons wearing uniforms.....	51

	Page
15. JOINT RESOLUTION OF MARCH 14, 1912.....	52
President empowered to issue neutrality proclamation.....	52
16. ACT OF MARCH 4, 1915.....	52
Sec. 2. Par. 1. Military prison, United States and branches, name changed to United States Disciplinary Barracks	52
Par. 2. Military offenses punishable in a penitentiary, confinement may be in United States, state, territory, or District penitentiary.....	52
Par. 3. Government and control of disciplinary bar- racks vested in the Adjutant General.....	53
Par. 4. Commandant and other commissioned and non- commissioned officers, etc., at, composition of	53
Par. 5. Duties of the commandant.....	53
Par. 6. Organization of disciplinary companies and higher units, etc.....	53
Par. 7. Clemency and restoration to colors of persons not discharged and re-enlistment of dis- charged persons.....	54
Par. 8. Secretary of War may designate branch disci- plinary barracks.....	54
Par. 9. Parole of general prisoners in disciplinary bar- racks, and restoration to duty of those serv- ing confinement in places other than discipli- nary barracks.....	54
17. ACT OF MARCH 4, 1915.....	54
Contracts entered into by Quartermaster Corps, certain ones to be reduced to writing, etc.....	54
18. ACT OF AUGUST 29, 1916.....	55
Contracts entered into by Signal Corps, certain ones to be re- duced to writing, etc.....	55
Contracts entered into by Medical Department, certain ones to be reduced to writing, etc.....	55

B. JUDICIAL OPINIONS

1. MILITARY AND CIVIL JURISDICTION~CONTRASTED—WAR POWERS.....	56
(a) <i>State and Federal Military Powers and Relations</i>	56
1. <i>Houston v. Moore</i> , 5 Wheat. 1 (1820).....	56
(State control of militia)	
2. <i>Dobbins v. Commissioners</i> , 16 Pet. 435 (1842).....	67
(State tax on officer's salary)	
3. <i>Commonwealth v. Blodgett</i> , 12 Metc. 56 (1846).....	72
(State's power to wage war)	
4. <i>In re Wehlitz</i> , 16 Wis. 443 (1863).....	76
(State subjecting to military service citizen of state who is not citizen of United States)	
5. <i>Ex parte McRoberts</i> , 16 Iowa, 600 (1864).....	84
(State jurisdiction over soldier on furlough)	
6. <i>Tarble's Case</i> , 13 Wall. 397 (1871).....	90
(State habeas corpus of one held under United States au- thority)	

1. MILITARY AND CIVIL JURISDICTION CONTRASTED—WAR POWERS (Cont'd)

(a) <i>State and Federal Military Powers and Relations</i> (Continued)	Page
07. <i>Ft. Leavenworth R. R. Co. v. Lowe</i> , 114 U. S. 525 (1885).. (United States control over military reservations)	97
8. <i>Commonwealth v. Murphy</i> , 166 Mass. 171 (1896).....	108
(State forbidding men to bear arms)	
9. <i>McGarray v. Murphy</i> , 80 Ohio St. 413 (1909).....	110
(State adopting Articles of War)	
10. <i>Bank of Phoebe v. Byrum</i> , 110 Va. 708 (1910).....	112
(Soldier at fort as resident of state)	
11. <i>State v. Peake</i> , 22 N. D. 457 (1912).....	114
(State militiaman not subject to Articles of War)	
(b) <i>Martial Law—Ordinary and Extraordinary Jurisdiction</i>	122
01. <i>Ex parte Milligan</i> , 4 Wall. 2 (1866).....	122
(Power of Congress to empower military commission to try citizen in time of peace)	
2. <i>Crandall v. Nevada</i> , 6 Wall. 35 (1867).....	132
(Right of federal government to transport troops through a state)	
3. <i>Ketchum v. Buckley</i> , 99 U. S. 188 (1878).....	133
(Appointment of military governor as affecting general laws of the state)	
4. <i>State v. Brown</i> , 71 W. Va. 519 (1912).....	135
(Governor's power to declare martial law in time of national peace)	
5. <i>Ex parte McDonald</i> , 49 Mont. 454 (1914).....	148
(Governor's power to declare martial law in time of national peace)	
o 6. <i>Ex parte King</i> , 246 Fed. 868 (1917).....	158
(Civil and military jurisdiction in time of war)	
(c) <i>Executive Powers</i>	163
1. <i>Martin v. Mott</i> , 12 Wheat. 19 (1827).....	163
(President's power to call out militia)	
2. <i>United States v. Ellason</i> , 16 Pet. 291 (1842).....	168
(President's power to establish rules for Army)	
3. <i>Fleming v. Page</i> , 9 How. 603 (1849).....	170
(President may invade hostile country)	
4. <i>Cross v. Harrison</i> , 16 How. 164 (1853).....	174
(President's power to institute provisional government in conquered territory)	
5. <i>The Grapeshot</i> , 9 Wall. 129 (1869).....	179
(President's power to set up provisional courts in enemy territory)	
6. <i>Hamilton v. Dillin</i> , 21 Wall. 73 (1874).....	181
(President's power to stop commercial intercourse with enemy)	
7. <i>Totten v. U. S.</i> , 92 U. S. 105 (1875).....	188
(President's power as commander-in-chief to employ secret service)	
8. <i>U. S. v. Symonds</i> , 120 U. S. 46 (1887).....	189
(President's power to issue orders in conflict with statutes of Congress)	
9. <i>Runkle v. U. S.</i> , 122 U. S. 543 (1887).....	192
(President may act through heads of departments)	

	Page
2. MILITARY PERSONS—SPECIAL RIGHTS AND LIABILITIES IN CIVIL LAW	201
1. Wilkes v. Dinsman, 7 How. 89 (1849).....	201
(Liability of officer for corporal punishment to enlisted man)	
2. Mitchell v. Harmony, 13 How. 115 (1851).....	207
(Officer's liability for property seizure for public use)	
3. Hough v. Hoodless, 35 Ill. 166 (1864).....	215
(Liability of officer for acts done at his command)	
4. Trammell v. Bassett, 24 Ark. 499 (1866).....	216
(Obedience to orders as justification)	
5. Bell v. Louisville R. R. Co., 64 Ky. 404 (1866).....	217
(Soldier's liability for property destroyed under orders of superior)	
6. Drehman v. Stifel, 41 Mo. 184 (1867).....	219
(Officer's liability for property seized under military necessity)	
7. Lewis v. McGuire, 66 Ky. 202 (1867).....	225
(Confiscation of property by military commander)	
8. Bates v. Clark, 95 U. S. 204 (1877).....	226
(Superior's orders as a justification)	
9. Dow v. Johnson, 100 U. S. 158 (1879).....	227
(Officer in enemy country; liability to laws of that country)	
10. Commonwealth v. Shortall, 206 Pa. 165 (1903).....	235
(Criminal liability of officer and enlisted man)	
11. Cleveland v. Harries, 32 App. D. C. 300 (1908).....	244
(Officer's liability for acts of subordinates)	
12. Franks v. Smith, 142 Ky. 232 (1911).....	246
(Civil liability of militiaman acting in obedience to orders)	
3. GOVERNMENT'S CIVIL LIABILITY FOR CONTRACTS AND TORTS BY MILITARY PERSONS	260
1. U. S. v. McLemore, 4 How. 286 (1846).....	260
(Suits against government without its consent)	
2. U. S. v. Adams, 7 Wall. 463 (1868).....	261
(Secretary of War's authority to make contracts for military establishment)	
3. The Floyd Acceptances, 7 Wall. 606 (1868).....	264
(Government's liability under contract by officer)	
4. U. S. v. Speed, 8 Wall. 77 (1868).....	270
(War Department contracts made in emergency)	
5. Smoot's Case, 15 Wall. 36 (1872).....	271
(Jurisdiction of suits on contracts)	
6. Clark v. U. S., 95 U. S. 539 (1877).....	276
(Contracts with government must be in writing)	
7. U. S. v. Pacific R. R., 120 U. S. 227 (1887).....	281
(Government's liability for property destroyed in military operations)	
8. St. Louis Hay & Grain Co. v. U. S., 191 U. S. 159 (1903).....	290
(Recovery on executed contract)	

TABLE OF CONTENTS

xiii

	Page
4. EFFECT OF WAR ON CIVIL RIGHTS AND LIABILITIES.....	293
1. Goodell v. Pike, 40 Vt. 319 (1867).....	293
(Infant soldier's will)	
2. Stewart v. Kahn, 11 Wall. 493 (1870).....	296
(Effect of war on suspension of time under statutes of limitation)	
3. Mutual Benefit Life Insurance Co. v. Hillyard, 37 N. J. Law, 444 (1874)	301
(Effect of war on contracts)	
4. Mayo & Jones v. Cartwright, 30 Ark. 407 (1875).....	310
(Effect of war on suspension of time under statutes of limitation)	
5. New York Ins. Co. v. Statham, 93 U. S. 24 (1876).....	314
(Effect of war on insurance policy)	
6. Horlock v. Beal, [1916] 1 A. C. 486.....	320
(Effect of war on contracts)	
7. Tingley v. Muller, [1917] 2 Ch. 144.....	323
(Effect of war on agency)	
8. The Kronprinzessin Cecilie; North German Lloyd v. Guaranty Trust Co., 238 F. 668 (1916)	326
(Effect of war on contracts)	
5. ARMY ORGANIZATION AND ADMINISTRATION.....	335
(a) Branches of the Army.....	335
1. U. S. v. Dunn, 120 U. S. 249 (1887).....	335
(Status of Marine Corps)	
2. McClaughry v. Deming, 186 U. S. 49 (1902).....	339
(Distinction between Regular Army and Volunteer Army)	
(b) Officers	350
1. U. S. v. Hunt, 14 Wall. 550 (1871).....	350
(Distinction between rank by "brevet" and without "brevet")	
2. Mimmack v. U. S., 97 U. S. 426 (1878)	351
(Resignation and dismissal of officers)	
3. Blake v. U. S., 103 U. S. 227 (1880).....	355
(Removal of officers)	
4. Crenshaw v. U. S., 134 U. S. 99 (1890).....	362
(Officer's vested interest or contract right)	
5. Schwenk v. Wyckoff, 46 N. J. Eq. 560 (1890).....	369
(Officer's assignment of unearned pay)	
6. Ray v. Garrison, 42 App. D. C. 34 (1914).....	372
(Promotion by examination and seniority)	
7. U. S. v. Andrews, 240 U. S. 90 (1916).....	374
(Officer's leave granted without pay)	
(c) Enlistment	377
1. In re Grimley, 137 U. S. 147 (1890).....	377
(Qualifications for enlistment)	
2. In re Morrissey, 137 U. S. 157 (1890).....	382
(Enlistment of minor)	

PART II. WAR-TIME SOURCES**A. LEGISLATIVE ENACTMENTS**

	Page
1. National Defense Act (June 3, 1916).....	384
Amended (April 17, 1918).....	445
Amended (May 25, 1918).....	446
2. Naval Appropriations Act (August 29, 1916).....	447
3. Shipping Board Act (September 7, 1916).....	447
Amended (July 15, 1918).....	455
4. Naval Emergency Fund Act (March 4, 1917).....	458
5. War Resolution (April 6, 1917).....	459
6. Selective Service Act (May 18, 1917).....	460
Amended (April 20, 1918).....	469
Amended (May 16, 1918).....	469
Amended (May 20, 1918).....	470
Amended (August 31, 1918).....	471
Conventions (June 3, 1918).....	474
7. Car Service Act (May 29, 1917).....	481
8. Emergency Shipping Fund Act (June 15, 1917).....	482
9. Espionage Act (June 15, 1917).....	484
Amended (May 16, 1918).....	500
10. Land Condemnation Act (July 2, 1917).....	502
11. Priority Shipment Act (August 10, 1917).....	502
12. Food and Fuel Control Act (August 10, 1917).....	504
13. War Risk Insurance Act (October 6, 1917).....	516
Amended (April 2, 1918).....	531
Amended (May 20, 1918).....	532
Amended (June 25, 1918).....	534
Amended (July 11, 1918).....	542
14. Trading with the Enemy Act (October 6, 1917).....	543
Amended (March 28, 1918).....	562
15. Soldiers' and Sailors' Civil Relief Act (March 8, 1918)....	563
16. Furlough Act (March 16, 1918).....	575
17. Federal Control of Carriers Act (March 21, 1918).....	575
18. Foreign Claims Act (April 18, 1918).....	583
19. War Materials Destruction Act (April 20, 1918).....	584
20. Executive Coordination Act (May 20, 1918).....	586
21. Army Appropriations Act (July 9, 1918).....	587
22. Control of Communications Act (July 16, 1918).....	602

B. REGULATIONS AND GENERAL ORDERS

1. General Orders, No. 7, Jan. 17, 1918.....	604
(Procedure on review of sentences of death, dismissal, or dishonorable discharge)	
2. Executive Order, No. 2877, May 31, 1918.....	606
(Function of Department of Justice)	
3. General Orders, No. 47, May 11, 1918.....	606
(Execution of contracts by officers)	
4. General Orders, No. 50, May 20, 1918.....	608
(Enlistment in foreign service)	

TABLE OF CONTENTS

xv

	Page
5. General Orders, No. 66, July 12, 1918, as amended by section IV, General Orders, No. 83, September 10, 1918.	610
(Enlisted personnel of Judge-Advocate-General's Department)	
6. Bulletin No. 35, July 3, 1918.	611
(Traffic in intoxicating liquor)	
7. General Orders, No. 73, August 7, 1918.	613
(Designation of United States Army)	
8. General Orders, No. 78, August 22, 1918.	614
(Appointment and promotion of officers)	
9. General Orders, No. 83, September 10, 1918.	616
(Administration of the War Risk Insurance Act)	

C. FEDERAL JUDICIAL OPINIONS (1917, 1918)

1. Arver v. U. S., 245 U. S. 306 (1918) Selective Draft Law Cases	617
(Congress' power to raise army by draft)	
2. Goldman v. U. S., 245 U. S. 474 (1918).	626
(Criminal conspiracy to incite resistance to law)	
3. In re Larrucea, 249 Fed. 981 (1917).	628
(Selective Service Act; declarant alien's liability)	
4. Masses Publishing Co. v. Patten, 246 Fed. 24 (1917).	631
(Espionage Act; non-mailable matter)	
5. U. S. v. Sugarman, 245 Fed. 604 (1917).	638
(Espionage Act; incitement to refusal of duty)	
6. In re Gerlach, 247 Fed. 616 (1917).	641
(Court-martial jurisdiction)	
7. Ex parte Graber, 247 Fed. 882 (1918).	643
(R. S. Sec. 4067; detention of alien enemy)	
8. Franke v. Murray, 248 Fed. 865 (1918).	647
(Selective Service Act; jurisdiction over deserter)	
9. U. S. ex rel. Bartolini v. Mitchell, 248 Fed. 997 (1918).	650
(Selective Service Act; liability of alien)	
10. Angelus v. Sullivan, 246 Fed. 54 (1917).	654
(Selective Service Act; liability of alien)	
11. State ex rel. Constanti v. Darwin, 173 Pac. 29 (1918).	661
(R. S. Sec. 4067; alien enemy trader's license)	
12. Minotto v. Bradley, Department of Justice, War Statutes Bulletin No. 105 (1918).	665
(R. S. Sec. 4067; detention of alien enemy)	
13. U. S. ex rel. Kotzen v. Local Exemption Board No. 157, for City of New York, Department of Justice, War Statutes Bulletin No. 124 (1918).	669
(Selective Service Act; burden of proof of alienage)	
14. U. S. v. Nearing, 252 Fed. 223 (1918).	672
(Espionage Act; incitement to refusal of military duty)	
15. U. S. v. Prieth, 251 Fed. 946 (1918).	677
(Espionage Act; incitement to refusal of military duty)	
16. In re Henry, 253 Fed. — (1918).	681
(Civil and military jurisdiction)	
17. U. S. v. Fontana, Congressional Record, Oct. 3, 1918 (1918) 684	
(Allegiance)	

D. JUDGE ADVOCATE GENERAL'S OPINIONS

	Page
(I) MISCELLANEOUS TOPICS.....	688
1. Naturalization of Allen Discharged from National Guard (Oct. 4, 1917).....	688
2. State Power to Raise Home Guard (Oct. 13, 1917).....	689
3. Drafting National Guard (Oct. 22, 1917).....	691
4. Commanding Officers' Authority to Aid Civil Authorities with Troops (Oct. 25, 1917).....	694
5. Delivery of Accused Soldier to Civil Authorities (Oct. 30, 1917)	694
6. Transfers of Enlisted Men from One Branch to Another (Nov. 1, 1917).....	695
7. Officer's Interest in Government Contract (Nov. 6, 1917)...	696
8. Arrest of Deserter by Civilian Officer (Nov. 16, 1917)....	697
9. Transfer of Officer from One Branch to Another (Nov. 27, 1917)	698
10. Discharge of Drafted Minor (Dec. 27, 1917).....	702
11. Duty of Military Person to Obey Subpœna to Testify in Civil Court (Jan. 2, 1918).....	705
12. Government Reimbursement of Personal Injury—Judgment against Contractors (Jan. 4, 1918).....	706
13. Allotment of Pay during Illness Due to Misconduct (Jan. 5, 1918).....	708
14. Induction of a Minor Falsely Registering as over Age (Jan. 10, 1918).....	709
15. Discharge of Soldier Convicted of Felony (Jan. 22, 1918)	712
16. Enlistment of Minor under 18 without Parents' Consent (Jan. 25, 1918).....	714
17. Government Liability for Damage by Military Operations (Feb. 5, 1918).....	715
18. Acquisition of Cantonment Sites—State Jurisdiction (Feb. 6, 1918).....	716
19. Stoppage of Group Pay for Torts (Feb. 15, 1918).....	717
20. War Department Disposal of United States Property by Gift (Feb. 19, 1918).....	719
21. Soldier's Right to Innkeeper's Services (Feb. 27, 1918)....	720
22. Cancellation of Contract for Hardship to Contractor (Feb. 27, 1918).....	721
23. Contract Clauses as to Infringement of Patent Rights (Feb. 28, 1918).....	723
24. Civilian Claim for Damage Done by Soldiers (March 5, 1918)	725
25. Jurisdiction of Offense by Selective en Route to Camp (March 6, 1918).....	727
26. Transfer or Sale of United States Property from One Bu- reau to Another (March 25, 1918).....	727
27. Accrual of War Risk Benefits for Inducted Men (March 26, 1918)	729
28. Military Jurisdiction of Civilian Employees (April 3, 1918)	729
29. Discharge of Regular Army Officer Temporarily Promoted (April 9, 1918).....	731
30. Transfer from National Army to Enlisted Reserve Corps (April 23, 1918).....	735

TABLE OF CONTENTS

xvii

(I) MISCELLANEOUS TOPICS (Continued)	Page
31. Forfeiture of Pay as Affecting Allotments under War Risk Insurance	738
(A) (April 23, 1918).....	738
(B) (May 18, 1918).....	741
32. Forfeiture of Pay by Deserter (April 25, 1918).....	743
33. Eligibility by Inducted Men for War Risk Insurance Benefits	744
(A) (May 1, 1918).....	744
(B) (July 5, 1918).....	745
34. Discharge for Disloyalty prior to Active Service (May 2, 1918)	746
35. Re-enlistment Status (May 7, 1918).....	748
36. Extra Compensation for Extra Work (May 7, 1918).....	750
37. Discharge without Trial or Board (May 10, 1918).....	752
38. Eligibility of Allen as Officer (May 11, 1918).....	755
39. Effect of Staff Commission on Line Commission (May 11, 1918)	755
40. Surgical Operation on a Soldier.....	758
(A) (Oct. 23, 1917).....	758
(B) (Jan. 25, 1918).....	760
(C) (March 5, 1918).....	760
(D) (April 9, 1918).....	761
(E) (May 13, 1918).....	763
41. Discharge of Regular Army Officer from Temporary Commission (May 13, 1918).....	763
42. Dental Corps, Basis of Computing Number of Officers (May 23, 1918).....	767
43. Discharge and Retirement of Dental Corps Officer (May 23, 1918)	771
44. Assessment of Group Damages under A. W. 105 (May 29, 1918)	773
45. Allotment of Pay for Liberty Bonds—Effect of Desertion (May 29, 1918).....	774
46. Civil Action by Soldier against Civilian (June 1, 1918)....	775
47. Decedent Soldiers' Estates.....	776
(A) Wills (March 11, 1918).....	776
(B) Personal Effects of Decedent—To Whom Delivered (June 24, 1918).....	777
48. Refund of Discharge Purchase Money to Drafted Man (June 25, 1918).....	780
49. Federal Status of National Guard as to Pay (June 29, 1918)	781
50. Allotment for Liberty Bonds, as Affected by Absence without Leave	783
(A) (July 2, 1918).....	783
(B) (July 5, 1918).....	785
51. Allotment of Soldiers in Non-Pay Status (July 12, 1918)...	786
52. Enlistment of Minors (July 15, 1918).....	787
53. Efficiency Boards (July 15, 1918).....	790
54. Relative Rank of Temporary and Permanent Commissions (July 18, 1918).....	794
55. Mileage and Travel Allowances for Officers Testifying before Civil Courts (July 23, 1918).....	797
55½. Removal of Reserve Officers from Internment to Officers' Camp (July 20, 1918).....	798

(I) MISCELLANEOUS TOPICS (Continued)	Page
56. Allotments on Liberty Bonds as Affected by Discharge (July 26, 1918).....	798
57. Alien Not Eligible for Naturalization—Right to Discharge (July 27, 1918).....	799
58. Expenses of Officer on Special Duty (July 27, 1918).....	800
59. Effect of Induction as to Pay (July 29, 1918).....	802
(II) COURTS-MARTIAL AND DISCIPLINARY TREATMENT.....	804
01. Court-Martial Jurisdiction of Prisoners of War (Dec. 27, 1917)	804
02. Effect of Error in Court-Martial Trial (Jan. 22, 1918)....	805
3. Jurisdiction of Divisional and Departmental Commanders (Jan. 25, 1918).....	806
4. Procedure under G. O. 7 (Feb. 13, 1918).....	808
05. Duration of Arrest of Soldier Awaiting Trial (Feb. 25, 1918)	811
6. Interim Investigation by Commanding Officer (Feb. 28, 1918)	813
7. G. O. 7—Larceny Penalty (March 2, 1918).....	814
8. Sundry Topics of Court-Martial Procedure (March 15, 1918)	816
9. Officer Preparing Charges—Eligibility as Member of Court (March 18, 1918).....	817
010. Jurisdiction of Military Police over Civilians (March 21, 1918)	820
11. Penitentiary Sentence for Civil Offenses (March 27, 1918)	821
12. Charge Laid under Wrong A. W. (March 30, 1918).....	822
13. Conviction by Summary Court for an Offense beyond Its Jurisdiction (March 30, 1918).....	823
14. Charges under A. W. 96 (May 21, 1918).....	824
15. Penitentiary Sentences, When Authorized (June 3, 1918)	825
16. Escape from Confinement, How Chargeable (June 13, 1918)	827
17. Military Persons Purchasing Liquor (June 21, 1918)....	829
18. Summary Court—Power to Reduce Rank (July 11, 1918)...	830
019. Errors in Court-Martial Records.....	831
(A) (July 17, 1918).....	831
(B) (Sept. 28, 1918).....	833
20. Offense of Disobedience of Orders (July 17, 1918).....	834
21. Authority to Appoint General Courts-Martial (July 17, 1918)	837
22. Punishment of Prisoner of War Attempting Escape (July 19, 1918).....	839
23. Place of Confinement When Sentence Exceeds Six Months (July 20, 1918).....	846
24. Compensation for Labor of Prisoners of War (July 20, 1918)	847
INDEX	849

A SOURCE-BOOK OF MILITARY LAW AND WAR-TIME LEGISLATION

PART I. PRE-WAR SOURCES OF MILITARY LAW

A. LEGISLATIVE ENACTMENTS

1. MUTINY ACT (1688)¹

(Statutes of the Realm, v. 6, pp. 55-56; 1 Wm. & M. c. 5.)

An Act for punishing Officers or Soldiers who shall Mutiny or Desert Their Majestyes Service.

Whereas the raising or keeping a Standing Army within this Kingdome in time of Peace unless it be with Consent of Parlyament is against Law. And whereas it is judged necessary by Their Majes-

¹ INTRODUCTORY HISTORICAL NOTE

By Colonel H. C. Carbaugh, U. S. A., Judge Advocate, Central Department

The Genesis of Anglo-American Military Law.—The military powers given to Congress by the Constitution of the United States were intended to authorize and empower it to bring into existence and maintain for the Army such a system of military law as was then existing in England as a separate institution from the common-law system existing there. It was intended that this military system should in a like manner be a separate institution from the system of law by which the personal liberty and rights guaranteed by the amendments to the Constitution were to be enforced.

1. These principles were announced in the Esmond Case, 5 Mackay, 73, in which the Supreme Court of the District of Columbia, sitting as an appellate court, said: "These provisions [of the Constitution] contemplate the establishment by Congress of two distinct systems of jurisdiction for the punishment of crimes and that each should be complete and sufficient. In other words, they import that the power of Congress to make rules for the government of the land and naval forces includes powers to establish institutions for the trial and punishment of crimes committed by persons in the land and naval forces, whose action and judgments shall be as conclusive for all purposes as the action and judgments of any other tribunals can be. If such tribunals have actually been established, their judgments must be treated precisely as the judgments of the court of the other system of jurisdiction are treated."

2. The constitutional history of England is a history of a struggle be-

tyes and this present Parliament That dureing this time of Danger severall of the Forces which are now on foote should be continued and others raised for the Safety of the Kingdome for the Common Defence of the Protestant Religion and for the reduceing of Ireland.

And whereas noe Man may be forejudged of Life or Limbe or subjected to any kinde of punishment by Martiall Law or in any other

tween the people and the Crown. The Crown sought to obtain or to exercise military law, both as to the Army and as to civillians in time of peace. The people sought to enforce the common law, and their victories are found in the Magna Carta, the Petition of Right, the Bill of Rights, and the preservation of the rules of common law favoring individual liberty.

The dispute went to the very existence of military law in England in time of peace by the sovereign's prerogative as to members of the Army or any one else, and even as to the possibility of its existence there in time of peace by the sovereign's prerogative.

3. It would appear that by the approval of the Petition of Right the Crown admitted that military law was not in force, and that it could not be brought into existence by prerogative of the Crown in time of peace as to the Army or at all. As a matter of fact, there was but little contention thereafter that it could be. No one doubted, of course, that it could be brought into existence by act of Parliament, because Parliament was the law-making body.

The Ipswich Mutiny in 1689 was the cause of bringing into existence military law in time of peace in order to preserve discipline in the Army. The common law gave the sovereign no power to control his troops. The deserter was treated as an ordinary felon, and was tried at the assizes by a petty jury on a bill found by a grand jury. At this time the King and the House of Commons were united, and both were menaced by a great military power from the ports of Normandy and Brittany. They decided that regular soldiers were indispensable, and that their efficiency and security of every other class must be maintained by keeping them under strict discipline. For the sake of public freedom they must, in the midst of freedom, be placed under a despotic rule. They must be subject to a sharper penal code and to a more stringent code of procedure than was administered by the ordinary tribunals.

4. A short bill was brought in the House of Commons, which began by declaring in explicit terms that standing armies and courts-martial were unknown to the law of England; and it was then and there enacted that any man who deserted his colors or mutinied against his commanding officer should be subjected to the pain of death or such lighter punishment as a court-martial should deem sufficient.

The first step was made without one dissentient voice in Parliament and without one murmur in the nation toward a change which had become necessary toward the safety in the state, yet which every party in the state then regarded with an extreme dread and aversion. Six months after, the power necessary for the maintenance of military discipline was a second time intrusted to the Crown for a short term, and by slow degrees finally reconciled the public mind to the names once so odious, viz. a standing Army and Courts-Martial. Thereafter not a session passed without a Mutiny Bill.

5. The Mutiny Act was in a nature of a concession to the Crown. It was granting the sovereign by law a part of what he had for centuries been insisting upon under his prerogative.

The history of the English Army, from the time the first Mutiny Act was passed to the present, shows that the military law applicable to the Army was understood and allowed by every one, and that the adoption of the Mutiny Acts authorized the King to enforce the whole body of the rules and principles in the Army, subject to certain exceptions made in the Mutiny Acts themselves.

6. When the American Revolution came on, the Articles of War were

manner then by the Judgement of his Peeres and according to the knowne and Established Laws of this Realme. Yet nevertheless it being requisite for retaining such Forces as are or shall be raised during this Exigence of Affaires in their Duty an exact Discipline be observed. And that Soldiers who shall Mutiny or stirr up Sedition or shall desert Their Majestyes Service be brought to a more

those made by the King under his prerogative so to do, expressly recognized by the annual Mutiny Acts. When the colonies began to act the part of absolute sovereignty, their Legislatures, assuming all powers exercised in England by both the King and Parliament, proceeded to enact Articles of War for the government of their respective armies, and thus to bring into existence, so far as their armies were concerned, that part of military law which had in England been applied to the Army in time of peace.

These enactments of the colonies have been followed by successive enactments of Articles of War by the Congress of the United States. These powers were invested in Congress by the eighth section of the Constitution of the United States. As Parliament and the Crown had, in England in time of peace under the English Constitution, maintained a military law system which was necessary to secure discipline in the Army coexistent with the common-law system and without improperly interfering with its principles relating to personal liberty, so our Constitution was framed to secure the same end under the legislative authority of Congress.

Petition of Right.—The Petition of Right (1627, 3 Car. I) contained the following clauses:

"The petition exhibited to his Majesty by the lords spiritual and temporal, and commons, in this present parliament assembled, concerning divers rights and liberties of the subjects, with the King's majesty's royal answer thereunto in full parliament.

"To the King's most excellent majesty: Humbly shew unto our sovereign lord the King, the lords spiritual and temporal, and commons in parliament assembled. * * *

"And whereas also by authority of parliament, in the five and twentieth year of the reign of King Edward the Third, it is declared and enacted, That no man should be forejudged of life or limb against the form of the great charter and the law of the land; and by the said great charter and other the laws and statutes of this your realm, no man ought to be adjudged to death but by the laws established in this your realm, either by the customs of the same realm, or by acts of parliament; and whereas no offender of what kind soever is exempted from the proceedings to be used, and punishments to be inflicted by the laws and statutes of this your realm; nevertheless of late time divers commissions under your Majesty's great seal have issued forth, by which certain persons have been assigned and appointed commissioners with power and authority to proceed within the land, according to the justice of martial law, against such soldiers or mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny or other outrage or misdemeanor whatsoever, and by such summary course and order as is agreeable to martial law, and as is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death according to the law martial:

"By pretext whereof some of your Majesty's subjects have been by some of the said commissioners put to death, when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might, and by no other ought to have been judged and executed: And also sundry grievous offenders, by colour thereof claiming an exemption, have escaped the punishments due to them by the laws and statutes of this your realm, by reason that divers of your officers and ministers of justice have unjustly refused or forborn to proceed against such offenders according to the same laws and statutes, upon pretence that the

Exemplary and speedy Punishment then the usuall Forms of Law will allow.

Bee it therefore Enacted by the King and Queenes most Excellent Majestyes by and with the Advice and Consent of the Lords Spirituall

said offenders were punishable only by martial law, and by authority of such commissions as aforesaid; which commissions, and all other of like nature, are wholly and directly contrary to the said laws and statutes of this your realm:

"They do therefore humbly pray your most excellent Majesty, * * * that your Majesty would be pleased to remove the said soldiers and mariners, and that your people may not be so burthened in time to come; and that the aforesaid commissions, for proceeding by martial law, may be revoked and annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesty's subjects be destroyed, or put to death contrary to the laws and franchise of the land. * * *

"All which they most humbly pray of your most excellent Majesty as their rights and liberties, according to the laws and statutes of this realm; and that your Majesty would also vouchsafe to declare, That the awards, doings and proceedings, to the prejudice of your people in any of the premises, shall not be drawn hereafter into consequence or example; and that your Majesty would be also graciously pleased, for the further comfort and safety of your people, to declare your royal will and pleasure, That in the things aforesaid all your officers and ministers shall serve you according to the laws and statutes of this realm, as they tender the honour of your Majesty, and the prosperity of this kingdom.

"Qua quidem petitione lecta et plenius intellecta per dictum dominum regem taliter est responsum in pleno parlamento, viz. Soit droit fait come est désiré."

✓ *Bill of Rights.*—The Bill of Rights (1688, 1 Wm. & M. cap. II) contained the following clauses:

"Whereas the late King James the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the protestant religion, and the laws and liberties of this kingdom.

✓ "1. By assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of parliament. * * *

✓ "5. By raising and keeping a standing army within this kingdom in time of peace, without consent of parliament, and quartering soldiers contrary to law.

"6. By causing several good subjects, being protestants, to be disarmed, at the same time when papists were both armed and employed, contrary to law. * * *

"All which are utterly and directly contrary to the known laws and statutes, and freedom of this realm.

"And whereas the said late King James the Second having abdicated the government, and the throne being thereby vacant, * * *

"And thereupon the said lords spiritual and temporal, and commons, pursuant to their respective letters and elections, being now assembled in a full and free representative of this nation, taking into their most serious consideration the best means of attaining the ends aforesaid; do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties, declare:

✓ "1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal. * * *

✓ "6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law."

and Temporall and Commons in this present Parlyament Assembled and by Authoritie of the same That from and after the Twelfth day of Aprill in the Yeare of our Lord One thousand six hundred eighty nine every Person being in Their Majestyes Service in the Army and being Mustered and in Pay as an Officer or Soldier who shall at any time before the Tenth Day of November in the Yeare of our Lord One thousand six hundred eighty nine Excite Cause or Joyne in any Mutiny or Sedition in the Army or shall desert Their Majestyes Service in the Army shall suffer Death or such other Punishment as by a Court-Martiall shall be Inflicted.

And it is hereby further Enacted and Declared That Their Majestyes or the Generall of Their Army for the time being may by vertue of this Act have full Power and Authority to grant Commissions to any Lieftenants Generall or other Officers not under the Degree of Colonells from time to time to Call and Assemble Court Martialls for Punishing such Offences as aforesaid.

And it is hereby further Enacted and Declared That noe Court Martiall which shall have power to inflict any punishment by vertue of this Act for the Offences aforesaid shall consist of fewer than thirteene whereof none to be under the degree of Captaines.

Provided alwayes That noe Field Officer be Tryed by other than Field Officers And that such Court Martiall shall have Power and Authority to administer an Oath to any Witsesse in order to the Examination or Tryall of the Offences aforesaid.

Provided alwayes that nothing in this Act contained shall extend or be construed to Exempt any Officer or Soldier whatsoever from the Ordinary Processe of Law.

Provided alwayes That this Act or any thing therein contained shall not extend or be any wayes construed to extend to or concerne any the Militia Forces of this Kingdome.

Provided alsoe that this Act shall continue and be in Force until the said Tenth day of November in the said Yeare of our Lord One thousand six hundred eighty nine and noe longer.

¶ Provided alwayes and bee it enacted That in all Tryalls of Offenders by Courts Martiall to be held by vertue of this Act where the Offence may be punished by death every Officer present at such Tryall before any Proceeding be had thereupon shall take an Oath upon the Evangelists before the Court (and the Judge Advocate or his Deputy shall and are hereby respectively Authorized to Administer the same) in these words That is to say

You shall well and truly Try and Determine according to your Evidence the Matter now before you betweene Our Sovereigne Lord and Lady the King and Queens Majestyes and the Prisoner to be Tryed.

Soe helpe you God.

And noe Sentence of Death shall be given [against²] any Offender in such Case by any Court Martiall unlesse nine of Thirteene Officers present shall concurr therein And if there be a greater number of Officers present then the Judgement shall passe by the concurrence of the greater part of them soe Sworne and not otherwise and noe

² Interlined on the roll.

Proceedings Tryall or Sentence of Death shall be had or given against any Offender but betweene the houres of Eight in the Morning and One in the Afternoone.^{3]}

2. CONSTITUTION OF THE UNITED STATES, 1787

ARTICLE I. (*Powers of Congress.*)

Sec. 8. (1) The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

Sec. 8. (11) To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

Sec. 8. (12) To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

Sec. 8. (13) To provide and maintain a Navy;

Sec. 8. (14) To make Rules for the Government and Regulation of the land and naval Forces;

Sec. 8. (15) To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

Sec. 8. (16) To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

Sec. 8. (17) To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;

Sec. 8. (18) To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer Thereof.

Sec. 9. (2) The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Sec. 10. (3) No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II. (*Powers of the President.*)

Section 1. (1) The executive Power shall be vested in a President of the United States of America. He shall hold his Office dur-

³ Annexed to the original act in a separate schedule.

ing the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected.

Section 2. (1) The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

ARTICLE III. (*Judicial Power.*)

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 3. (1) Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

ARTICLE IV. (*Protection of States against Invasion.*)

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION

[*Bill of Rights*]

[ARTICLE I.]

Congress shall make no law respecting and establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[ARTICLE II.]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

[ARTICLE III.]

No Soldier shall, in time of peace, be quartered in any house without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

[ARTICLE V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,

except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.⁴

3. ARTICLES OF WAR (1775-1916)⁵

[Public—No. 242—64th Congress. H. R. 17498.]

An Act Making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes. [Aug. 29, 1916.]

Sec. 3. Section thirteen hundred and forty-two of the Revised Statutes of the United States be, and the same is hereby, amended to read as follows:

"Sec. 1342. The articles included in this section shall be known as

⁴ *Declaration of Independence*.—The Declaration of Independence (1776) contained the following clauses:

✓ "15. He has kept among us in times of peace, Standing Armies without the Consent of our legislatures."

✓ "18. For quartering large bodies of armed troops among us: 19. For protecting them, by a mock Trial, from punishment for any murders which they should commit on the Inhabitants of these States."

Massachusetts Declaration of Rights.—The Massachusetts Declaration of Rights (1780) contained the following article:

✓ "Art. XXVIII, No Person can in any case be subject to law-martial or to any penalties or pains, by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by authority of the legislature."

⁵HISTORICAL NOTE

From "*Military Laws of the United States*" (5th Ed., 1917) c. XXXIX.

1. *British Code*.—In the early periods of English history military law existed only in time of actual war. When war broke out troops were raised as occasion required, and ordinances for their government, or, as they were afterwards called, articles of war, were issued by the Crown, with the advice of the constable or of the peers or other experienced persons, or were enacted by the commander in chief in pursuance of an authority for that purpose given in his commission from the Crown. (Grose, *Antiquities*, vol. 2, p. 58.)

These ordinances or articles, however, remained in force only during the service of the troops of whose government they were issued, and ceased to operate on the conclusion of peace. Military law in time of peace did not come into existence until the passing of the first Mutiny Act in 1689.

✓ The system of governing troops in active service by articles of war, issued under the prerogative power of the Crown, whether issued by the King himself or by the commanders in chief, or by other officers holding commissions from the Crown, continued from the time of the Conquest till long after the passing of the annual Mutiny Acts (*Barwis v. Keppel*, 2 Wilson's Rep. 314), and did not actually cease till the prerogative power of issuing such articles was superseded in 1803 by a corresponding statutory power (43 Geo. III, ch. 20).

The earlier articles were of excessive severity, inflicting death or loss of limb for almost every crime. Gradually, however, they assumed some-

the Articles of War and shall at all times and in all places govern the armies of the United States.

✓ thing of the shape which they bear in modern times, and the ordinances or articles of war issued by Charles II in 1672 formed the groundwork of the articles of war of 1775, which were consolidated with the mutiny act in the army discipline and regulation act of 1779, which was replaced by the army act of 1881. The army code of 1881, which now constitutes the military code of the British Army, has of itself no force, but requires to be brought into operation annually by another act of Parliament, thus securing the constitutional principle of the control of the Parliament over the discipline requisite for the government of the army. (*Manual of Military Law*. War Office, 1914, pp. 6-14.)

2. *American Codes*.—(a) *Code of 1775*.—Passing over the earlier enactments of the American colonies of articles of war for the government of their respective contingents, of which we have examples in the articles adopted by the Provisional Congress of Massachusetts Bay, April 5, 1775 (*American Archives*, 4th Series, vol. 1, p. 1350), followed by similar articles adopted in May and June of the same year, successively, by the Provincial Assemblies of Connecticut and Rhode Island and the Congress of New Hampshire (*Idem*, vol. 2, pp. 565, 1153, 1180), we come to the first American articles—Code of 1775—enacted by the Second Continental Congress, June 30, 1775. Of this code, comprising 69 articles, the original was the existing British Code of 1774, from which said articles were largely copied. The code was amended by the Continental Congress of November 7, 1775, by adding thereto 16 provisions, intended to complete the original draft in certain particulars in which it was imperfect.

(b) *Code of 1776*.—The Articles of 1775 were superseded the following year by what has since been known as the Code of 1776, enacted September 20 of that year. It was an enlargement, with modifications, of the amended Code of 1775. There followed the amendments of 1786, regulating the composition of courts-martial, and generally the administration of military justice. As thus amended the code survived the adoption of the Constitution of the United States, being continued in force by successive statutes, "so far as the same are applicable to the Constitution of the United States." The necessity, however, for revision, in order to adapt the articles to the changed form of government, became obvious. This revision was accomplished by the act of April 10, 1806 (2 Stat. 259), which superseded all other enactments on the same subject, and is generally designated as the

(c) *Code of 1806*.—The Code of 1806 comprised 101 articles, with an additional provision relating to the punishment of spies. There was no formal revision of the Articles of War in the revision of the Statutes of 1874, although there was such a restatement of them as was possible under the authority which the revisers who prepared that revision had to bring together "all statutes which, from similarity of subject, ought to be brought together, omitting redundant or obsolete enactments, and making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text." Under this limited authority no recasting of the articles or substantial amendment was possible, and the code as it appeared in the Revised Statutes of 1874, and as it was repeated in the second edition thereof in 1878, was substantially the Code of 1806, expanded to embrace amendments and new legislation since that date. It embraced 128 articles, with the additional provision as to spies, and these, with the amendments enacted since 1878, remained for 110 years the military code of the United States.

(d) *Code of 1916*.—The Code of 1916 was enacted August 29, 1916. (39 Stat. 650; Comp. St. 1916, §§ 2308a[1]-2308a[121].) It became effective on March 1, 1917, except as to certain articles which were made immediately effective in order to meet conditions confronting the punitive expedition then in Mexico.

"I. PRELIMINARY PROVISIONS

"Article 1. *Definitions.*—The following words when used in these articles shall be construed in the sense indicated in this Article, unless the context shows that a different sense is intended, namely:

"(a) The word 'officer' shall be construed to refer to a commissioned officer;

"(b) The word 'soldier' shall be construed as including a noncommissioned officer, a private, or any other enlisted man;

"(c) The word 'company' shall be understood as including a troop or battery; and

"(d) The word 'battalion' shall be understood as including a squadron.

"Art. 2. *Persons subject to military law.*—The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles: Provided, That nothing contained in this Act, except as specifically provided in Article two, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction, unless otherwise specifically provided by law.

"(a) All officers and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft or order to obey the same;

"(b) Cadets;

"(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: Provided, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases;

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

"(e) All persons under sentence adjudged by courts-martial;

"(f) All persons admitted into the Regular Army Soldiers' Home, at Washington, District of Columbia.

"II. COURTS-MARTIAL

"Art. 3. *Courts-martial classified.*—Courts-martial shall be of three kinds, namely:

"First, general courts-martial;

"Second, special courts-martial; and

"Third, summary courts-martial.

"A. COMPOSITION

"Art. 4. *Who may serve on courts-martial.*—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial.

"Art. 5. *General courts-martial.*—General courts-martial may consist of any number of officers from five to thirteen, inclusive; but they shall not consist of less than thirteen, when that number can be convened without manifest injury to the service.

"Art. 6. *Special courts-martial.*—Special courts-martial may consist of any number of officers from three to five, inclusive.

"Art. 7. *Summary courts-martial.*—A summary court-martial shall consist of one officer.

"B. BY WHOM APPOINTED

"Art. 8. *General courts-martial.*—The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an army, an army corps, a division, or a separate brigade, and, when empowered by the President, the commanding officer of any district or of any force or body of troops may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

"Art. 9. *Special courts-martial.*—The commanding officer of a district, garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a brigade, regiment, detached battalion, or other detached command may appoint special courts-martial; but when any such commanding officer is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior authority, and may in any case be appointed by superior authority when by the latter deemed desirable; and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

"Art. 10. *Summary courts-martial.*—The commanding officer of a garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a regiment, detached battalion, detached company, or other detachment may appoint summary courts-martial; but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable: Provided, That when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him.

"Art. 11. *Appointment of judge advocates.*—For each general or special court-martial the authority appointing the court shall appoint a judge advocate, and for each general court-martial one or more assistant judge advocates when necessary.

"C. JURISDICTION

"Art. 12. *General courts-martial.*—General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles and any other person who by the law of war is subject to trial by military tribunals: Provided, That no officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy.

"Art. 13. *Special courts-martial.*—Special courts-martial shall have power to try any person subject to military law, except an officer, for any crime or offense not capital made punishable by these articles: Provided, That the President may, by regulations, which he may modify from time to time, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law.

"Special courts-martial shall not have power to adjudge dishonorable discharge, nor confinement in excess of six months, nor to adjudge forfeiture of more than six months' pay.

"Art. 14. *Summary courts-martial.*—Summary courts-martial shall have power to try any person subject to military law, except an officer, a cadet, or a soldier holding the privileges of a certificate of eligibility to promotion, for any crime or offense not capital made punishable by these articles: Provided, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a general court-martial: Provided further, That the President may, by regulations, which he may modify from time to time, except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law.

"Summary courts-martial shall not have power to adjudge confinement in excess of three months, nor to adjudge the forfeiture of more than three months' pay: Provided, That when the summary court officer is also the commanding officer no sentence of such summary court-martial adjudging confinement at hard labor or forfeiture of pay, or both, for a period in excess of one month shall be carried into execution until the same shall have been approved by superior authority.

"Art. 15. *Not exclusive.*—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals.

"Art. 16. *Officers; how triable.*—Officers shall be triable only by general courts-martial, and in no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank.

"D. PROCEDURE

"Art. 17. *Judge advocate to prosecute.*—The judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. The accused shall have the right to be represented before the court by counsel of his own selection for his defense, if such counsel be reasonably available, but should he, for any

reason, be unrepresented by counsel, the judge advocate shall from time to time throughout the proceedings advise the accused of his legal rights.

"Art. 18. *Challenges*.—Members of a general or special court-martial may be challenged by the accused, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time.

"Art. 19. *Oaths*.—The judge advocate of a general or special court-martial shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation: 'You, A. B., do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority, except to the judge advocate and assistant judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God.'

"When the oath or affirmation has been administered to the members of a general or special court-martial, the president of the court shall administer to the judge advocate and to each assistant judge advocate, if any, an oath or affirmation in the following form: 'You, A. B., do swear (or affirm) that you will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed by the same. So help you God.'

"All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form: 'You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God.'

"Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: 'You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God.'

"Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: 'You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God.'

"In case of affirmation the closing sentence of adjuration will be omitted.

"Art. 20. *Continuances*.—A court-martial may, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just.

"Art. 21. *Refusal to plead*.—When the accused, arraigned before a court-martial, from obstinancy and deliberate design stands mute or

answers foreign to the purpose, the court may proceed to trial and judgment as if he had pleaded not guilty.

"Art. 22. *Process to obtain witnesses.*—Every judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue; but such process shall run to any part of the United States, its Territories, and possessions.

"Art. 23. *Refusal to appear or testify.*—Every person not subject to military law who, being duly subpoenaed to appear as a witness before any military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person may have been legally subpoenaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States or in a court of original criminal jurisdiction in any of the Territorial possessions of the United States, jurisdiction being hereby conferred upon such courts for such purpose; and it shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than \$500 or imprisonment not to exceed six months, or both, at the discretion of the court: Provided, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses.

"Art. 24. *Compulsory self-incrimination prohibited.*—No witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him.

"Art. 25. *Depositions—When admissible.*—A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or district in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: Provided, That testimony by deposition may be adduced for the defense in capital cases.

"Art. 26. *Depositions—Before whom taken.*—Depositions to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration, may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

"Art. 27. *Courts of inquiry—Records of, when admissible.*—The record of the proceedings of a court of inquiry may be read in evidence before any court-martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board: Provided, That such evidence may be adduced by the defense in capital cases or cases extending to the dismissal of an officer.

"Art. 28. *Resignation without acceptance does not release officer.*—Any officer who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to absent himself permanently therefrom shall be deemed a deserter.

"Art. 29. *Enlistment without discharge.*—Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and, where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein.

"Art. 30. *Closed sessions.*—Whenever a general or special court-martial shall sit in closed session, the judge advocate and the assistant judge advocate, if any, shall withdraw; and when their legal advice or their assistance in referring to the recorded evidence is required, it shall be obtained in open court, and in the presence of the accused and of his counsel if there be any.

"Art. 31. *Order of voting.*—Members of a general or special court-martial, in giving their votes, shall begin with the junior in rank.

"Art. 32. *Contempts.*—A court-martial may punish at discretion, subject to the limitations contained in Article fourteen, any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder.

"Art. 33. *Records—General courts-martial.*—Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the judge advocate; but in case the record can not be authenticated by the judge advocate, by reason of his death, disability, or absence, it shall be signed by the president and an assistant judge advocate, if any; and if there be no assistant judge advocate, or in case of his death, disability, or absence, then by the president and one other member of the court.

"Art. 34. *Records—Special and summary courts-martial.*—Each special court-martial and each summary court-martial shall keep a record of its proceedings, separate for each case, which record shall contain such matter and be authenticated in such manner as may be

required by regulations which the president may from time to time prescribe.

"Art. 35. *Disposition of records—General courts-martial.*—The judge advocate of each general court-martial shall, with such expedition as circumstances may permit, forward to the appointing authority or to his successor in command the original record of the proceedings of such court in the trial of each case. All records of such proceedings shall, after having been finally acted upon, be transmitted to the Judge Advocate General of the Army.

"Art. 36. *Disposition of records—Special and summary courts-martial.*—After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by special court-martial and a report of each trial by summary court-martial shall be transmitted to such general headquarters as the President may designate in regulations, there to be filed in the office of the judge advocate. When no longer of use, records of special and summary courts-martial may be destroyed.

"Art. 37. *Irregularities—Effect of.*—The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved, in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused: Provided, That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles: Provided further, That the omission of the words 'hard labor' in any sentence of a court-martial adjudging imprisonment or confinement shall not be construed as depriving the authorities executing such sentence of imprisonment or confinement of the power to require hard labor as a part of the punishment in any case where it is authorized by the Executive order prescribing maximum punishments.

"Art. 38. *President may prescribe rules.*—The President may by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals: Provided, That nothing contrary to or inconsistent with these articles shall be so prescribed: Provided further, That all rules made in pursuance of this article shall be laid before the Congress annually.

"E. LIMITATIONS UPON PROSECUTIONS

"Art. 39. *As to time.*—Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: Provided, That for desertion in time of peace or for any crime or offense punishable under articles ninety-three and ninety-four of this code the period of limitations upon trial and punishment by court-martial shall be three years: Provided further, That the period of any absence of the accused from the jurisdiction of the United States, and

also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation: And provided further, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law.

"Art. 40. *As to number.*—No person shall be tried a second time for the same offense.

"F. PUNISHMENTS

"Art. 41. *Certain kinds prohibited.*—Punishment by flogging, or by branding, marking, or tattooing on the body is prohibited.

"Art. 42. *Places of confinement—When lawful.*—Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall under the sentence of a court-martial be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature by some statute of the United States, or at the common law as the same exists in the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is one year or more: Provided, That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary: Provided further, That penitentiary confinement hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States: Provided further, That persons sentenced to dishonorable discharge and to confinement not in a penitentiary, shall be confined in the United States Disciplinary Barracks or elsewhere as the Secretary of War or the reviewing authority may direct, but not in a penitentiary.

"Art. 43. *Death sentence—When lawful.*—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of two-thirds of the members of said court-martial and for an offense in these articles expressly made punishable by death. All other convictions and sentences, whether by general or special court-martial, may be determined by a majority of the members present.

"Art. 44. *Cowardice; fraud—Accessory penalty.*—When an officer is dismissed from the service for cowardice or fraud, the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp and in the State from which the offender came or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him.

"Art. 45. *Maximum limits.*—Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not, in time of peace, exceed such limit or limits as the President may from time to time prescribe.

"G. ACTION BY APPOINTING OR SUPERIOR AUTHORITY

"Art. 46. *Approval and execution of sentence.*—No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being.

"Art. 47. *Powers incident to power to approve.*—The power to approve the sentence of a court-martial shall be held to include:

"(a) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt; and

"(b) The power to approve or disapprove the whole or any part of the sentence.

"Art. 48. *Confirmation—When required.*—In addition to the approval required by article forty-six, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, namely:

"(a) Any sentence respecting a general officer:

"(b) Any sentence extending to the dismissal of an officer, except that in time of war a sentence extending to the dismissal of an officer below the grade of brigadier general may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division;

"(c) Any sentence extending to the suspension or dismissal of a cadet; and

"(d) Any sentence of death, except in the cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies; and in such excepted cases a sentence of death may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the Territorial department or division.

"When the authority competent to confirm the sentence has already acted as the approving authority no additional confirmation by him is necessary.

"Art. 49. *Powers incident to power to confirm.*—The power to confirm the sentence of a court-martial shall be held to include:

"(a) The power to confirm or disapprove a finding, and to confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to confirm, the evidence of record requires a finding of only the lesser degree of guilt; and

"(b) The power to confirm or disapprove the whole or any part of the sentence.

"Art. 50. *Mitigation or remission of sentences.*—The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole or any part of the sentence, but no sentence of dismissal of an officer and no sentence of death shall be mitigated or remitted by any authority inferior to the President.

"Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the person under sentence is held, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority; but no sentence extending to the dismissal of an officer or loss of files, no sentence of death, and no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority.

"The power of remission and mitigation shall extend to all uncollected forfeitures adjudged by sentence of a court-martial."

"Art. 51. *Suspension of sentences of dismissal or death.*—The authority competent to order the execution of a sentence of dismissal of an officer or a sentence of death may suspend such sentence until the pleasure of the President be known, and in case of such suspension a copy of the order of suspension, together with a copy of the record of trial, shall immediately be transmitted to the President.

"Art. 52. *Suspension of sentence of dishonorable discharge.*—The authority competent to order the execution of a sentence, including dishonorable discharge, may suspend the execution of the dishonorable

* 65th Congress, 2d Session. S. 4969.

In the Senate of the United States

October 3, 1918.

Mr. Chamberlain introduced the following bill, which was read twice and referred to the Committee on Military Affairs. [Identical with a bill which passed in the House of Representatives on October 4, 1918.]

A Bill to amend the fiftieth article of war.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That article fifty of section thirteen hundred and forty-two of the Revised Statutes of the United States as amended by the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, be, and the same is hereby, amended to read as follows:

"Art. 50. *Mitigation or remission of sentences.*—The power to order the execution of the sentence adjudged by a court-martial shall be held to include, *inter-alia*, the power to mitigate, or remit the whole or any part of the sentence.

"Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the person under sentence is held, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority; but no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority and no approved sentence of loss of files by an officer shall be remitted or mitigated by any authority inferior to the President, except as provided in the fifty-second article.

"When empowered by the President so to do the commanding general of the Army in the field or the commanding general of the territorial department or division may mitigate or remit and order executed as mitigated or remitted any sentence which under these articles requires the confirmation of the President before the same may be executed.

"The power of remission and mitigation shall extend to all uncollected forfeitures adjudged by sentence of a court-martial."

discharge until the soldier's release from confinement; but the order of suspension may be vacated at any time and the execution of the dishonorable discharge directed by the officer having general court-martial jurisdiction over the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the soldier is held or by the Secretary of War.

"Art. 53. *Suspension of sentences of forfeiture or confinement.*—The authority competent to order the execution of a sentence adjudged by a court-martial may, if the sentence involve neither dismissal nor dishonorable discharge, suspend the execution of the sentence in so far as it relates to the forfeiture of pay or to confinement, or to both; and the person under sentence may be restored to duty during the suspension of confinement. At any time within one year after the date of the order of suspension such order may, for sufficient cause, be vacated and the execution of the sentence directed by the military authority competent to order the execution of like sentences in the command, exclusive of penitentiaries and the United States Disciplinary Barracks, to which the person under sentence belongs or in which he may be found; but if the order of suspension be not vacated within one year after the date thereof the suspended sentence shall be held to have been remitted.

"III. PUNITIVE ARTICLES

"A. ENLISTMENT; MUSTER; RETURNS

"Art. 54. *Fraudulent enlistment.*—Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court-martial may direct.

"Art. 55. *Officer making unlawful enlistment.*—Any officer who knowingly enlists or musters into the military service any person whose enlistment or muster in is prohibited by law, regulations, or orders shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

"Art. 56. *Muster rolls—False muster.*—At every muster of a regiment, troop, battery, or company the commanding officer thereof shall give to the mustering officer certificates, signed by himself, stating how long absent officers have been absent and the reasons of their absence. And the commanding officer of every troop, battery, or company shall give like certificates, stating how long absent noncommissioned officers and private soldiers have been absent and the reasons of their absence. Such reasons and time of absence shall be inserted in the muster rolls opposite the names of the respective absent officers and soldiers, and the certificates, together with the muster rolls, shall be transmitted by the mustering officer to the Department of War as speedily as the distance of the place and muster will admit. Any officer who knowingly makes a false muster of man or animal, or who signs or directs or allows the signing of any muster roll knowing the same to contain a false muster or false statement as to the absence or pay of an officer or soldier, or who wrongfully takes money or other consideration on mustering in a regiment, company, or other organization, or on signing muster rolls, or who knowingly musters as an

officer or soldier a person who is not such officer or soldier, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

"Art. 57. *False returns—Omission to render returns.*—Every officer commanding a regiment, an independent troop, battery, or company, or a garrison, shall, in the beginning of every month, transmit through the proper channels, to the Department of War, an exact return of the same, specifying the names of the officers then absent from their posts, with the reasons for and the time of their absence. Every officer whose duty it is to render to the War Department or other superior authority a return of the state of the troops under his command, or of the arms, ammunitions, clothing, funds, or other property thereunto belonging, who knowingly makes a false return thereof shall be dismissed from the service and suffer such other punishment as a court-martial may direct. And any officer who, through neglect or design, omits to render such return shall be punished as a court-martial may direct.

"B. DESERTION—ABSENCE WITHOUT LEAVE

"Art. 58. *Desertion.*—Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

"Art. 59. *Advising or aiding another to desert.*—Any person subject to military law who advises or persuades or knowingly assists another to desert the service of the United States shall, if the offense be committed in time of war, suffer death, or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

"Art. 60. *Entertaining a deserter.*—Any officer who, after having discovered that a soldier in his command is a deserter from the Military or naval service or from the Marine Corps, retains such deserter in his command without informing superior authority or the commander of the organization to which the deserter belongs, shall be punished as a court-martial may direct.

"Art. 61. *Absence without leave.*—Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct.

"C. DISRESPECT—INSUBORDINATION—MUTINY

"Art. 62. *Disrespect toward the President, Vice President, Congress, Secretary of War, governors, legislatures.*—Any officer who uses contemptuous or disrespectful words against the President, Vice President, the Congress of the United States, the Secretary of War, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

Any other person subject to military law who so offends shall be punished as a court-martial may direct.

"Art. 63. *Disrespect toward superior officer.*—Any person subject to military law who behaves himself with disrespect toward his superior officer shall be punished as a court-martial may direct.

"Art. 64. *Assaulting or willfully disobeying superior officer.*—Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct.

"Art. 65. *Insubordinate conduct toward noncommissioned officer.*—Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or willfully disobeys the lawful order of a noncommissioned officer while in the execution of his office, or uses threatening or insulting language, or behaves in an insubordinate or disrespectful manner toward a noncommissioned officer while in the execution of his office, shall be punished as a court-martial may direct.

"Art. 66. *Mutiny or sedition.*—Any person subject to military law who attempts to create or who begins, excites, causes, or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court-martial may direct.

"Art. 67. *Failure to suppress mutiny or sedition.*—Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor, to suppress the same, or knowing or having reason to believe that a mutiny or sedition is to take place, does not without delay give information thereof to his commanding officer shall suffer death or such other punishment as a court-martial may direct.

"Art. 68. *Quarrels; frays; disorders.*—All officers and noncommissioned officers have power to part and quell all quarrels, frays, and disorders among persons subject to military law and to order officers who take part in the same into arrest, and other persons subject to military law who take part in the same into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer or noncommissioned officer or draws a weapon upon or otherwise threatens or does violence to him shall be punished as a court-martial may direct.

"D. ARREST; CONFINEMENT

"Art. 69. *Arrest or confinement of accused persons.*—An officer charged with crime or with a serious offense under these articles shall be placed in arrest by the commanding officer, and in exceptional cases an officer so charged may be placed in confinement by the same authority. A soldier charged with crime or with a serious offense under these articles shall be placed in confinement, and when charged with a minor offense he may be placed in arrest. Any other person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; and when charged with a minor offense such

person may be placed in arrest. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer who breaks his arrest or who escapes from confinement before he is set at liberty by proper authority shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest before he is set at liberty by proper authority shall be punished as a court-martial may direct.

"Art. 70. *Investigation of and action upon charges.*—No person put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled. When any person is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested person be not brought to trial, as herein required, the arrest shall cease. But persons released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest: Provided, That in time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

"Art. 71. *Refusal to receive and keep prisoners.*—No provost marshal or commander of a guard shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States, provided the officer committing shall, at the time, deliver an account in writing, signed by himself, of the crime or offense charged against the prisoner. Any officer or soldier so refusing shall be punished as a court-martial may direct.

"Art. 72. *Report of prisoners received.*—Every commander of a guard to whose charge a prisoner is committed shall, within twenty-four hours after such confinement, or as soon as he is relieved from his guard, report in writing to the commanding officer the name of such prisoner, the offense charged against him, and the name of the officer committing him; and if he fails to make such report he shall be punished as a court-martial may direct.

"Art. 73. *Releasing prisoner without proper authority.*—Any person subject to military law who, without proper authority, releases any prisoner duly committed to his charge, or who through neglect or design suffers any prisoner so committed to escape, shall be punished as a court-martial may direct.

"Art. 74. *Delivery of offenders to civil authorities.*—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these

articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused persons to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

"When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence.

"E. WAR OFFENSES

"Art. 75. *Misbehavior before the enemy.*—Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons or delivers up any fort, post, camp, guard, or other command which it is his duty to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, or by any means whatsoever occasions false alarms in camp, garrison, or quarters, shall suffer death or such other punishment as a court-martial may direct.

"Art. 76. *Subordinates compelling commander to surrender.*—If any commander of any garrison, fort, post, camp, guard, or other command is compelled, by the officers or soldiers under his command, to give it up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death or such other punishment as a court-martial may direct.

"Art. 77. *Improper use of countersign.*—Any person subject to military law who makes known the parole or countersign to any person not entitled to receive it according to the rules and discipline of war, or gives a parole or countersign different from that which he received, shall, if the offense be committed in time of war, suffer death, or such other punishment as a court-martial may direct.

"Art. 78. *Forcing a safeguard.*—Any person subject to military law who, in time of war, forces a safeguard shall suffer death or such other punishment as a court-martial may direct.

"Art. 79. *Captured property to be secured for public service.*—All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punished as a court-martial may direct.

"Art. 80. *Dealing in captured or abandoned property.*—Any person subject to military law who buys, sells, trades, or in any way deals

in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties.

"Art. 81. *Relieving, corresponding with, or aiding the enemy.*—Whosoever relieves the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial or military commission may direct.

"Art. 82. *Spies.*—Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.

"F. MISCELLANEOUS CRIMES AND OFFENSES

"Art. 83. *Military property—Willful or negligent loss, damage, or wrongful disposition of.*—Any person subject to military law who willfully, or through neglect, suffers to be lost, spoiled, damaged, or wrongfully disposed of, any military property belonging to the United States shall make good the loss or damage and suffer such punishment as a court-martial may direct.

"Art. 84. *Waste or unlawful disposition of military property issued to soldiers.*—Any soldier who sells or wrongfully disposes of or willfully or through neglect injures or loses any horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, shall be punished as a court-martial may direct.

"Art. 85. *Drunk on duty.*—Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall be punished as a court-martial may direct. Any person subject to military law, except an officer, who is found drunk on duty shall be punished as a court-martial may direct.

"Art. 86. *Misbehavior of sentinel.*—Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall suffer any punishment, except death, that a court-martial may direct.

"Art. 87. *Personal interest in sale of provisions.*—Any officer commanding in any garrison, fort, barracks, camp, or other place where troops of the United States may be serving who, for his private advantage, lays any duty or imposition upon or is interested in the sale of any victuals or other necessities of life brought into such garrison,

fort, barracks, camp, or other place for the use of the troops, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

"Art. 88. *Intimidation of persons bringing provisions.*—Any person subject to military law who abuses, intimidates, does violence to, or wrongfully interferes with any person bringing provisions, supplies, or other necessities to the camp, garrison, or quarters of the forces of the United States shall suffer such punishment as a court-martial may direct.

"Art. 89. *Good order to be maintained and wrongs redressed.*—All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste or spoil, or willfully destroys any property whatsoever (unless by order of his commanding officer), or commits any kind of depredation or riot shall be punished as a court-martial may direct. Any commanding officer who, upon complaint made to him, refuses or omits to see reparation made to the party injured, in so far as the offender's pay shall go toward such reparation, as provided for in article one hundred and five, shall be dismissed from the service, or otherwise punished, as a court-martial may direct.

"Art. 90. *Provoking speeches or gestures.*—No person subject to military law shall use any reproachful or provoking speeches or gestures to another; and any person subject to military law who offends against the provisions of this article shall be punished as a court-martial may direct.

"Art. 91. *Duelling.*—Any person subject to military law who fights or promotes or is concerned in or connives at fighting a duel, or who having knowledge of a challenge sent or about to be sent fails to report the fact promptly to the proper authority shall, if an officer, be dismissed from the service or suffer such other punishment as a court-martial may direct; and if any other person subject to military law, shall suffer such punishment as a court-martial may direct.

"Art. 92. *Murder—Rape.*—Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

"Art. 93. *Various crimes.*—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.

"Art. 94. *Frauds against the Government.*—Any person subject to military law who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

"Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

"Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures, or advises the making or use of, any writing or other paper, knowing the same to contain any false or fraudulent statements; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes, or procures, or advises the making of, any oath to any fact or to any writing or other paper knowing such oath to be false; or

"Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures, or advises the forging or counterfeiting of any signature upon any writing or other paper, or uses, or procures, or advises the use of any such signature, knowing the same to be forged or counterfeited; or

"Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

"Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the military service thereof, makes or delivers to any person such writing, without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States; or

"Who steals, embezzles, knowingly and willingly misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof; or

"Who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipment, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same;

"Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties. And if any person, being guilty of any of the offenses aforesaid while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

"Art. 95. *Conduct unbecoming an officer and gentleman.*—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

"Art. 96. *General article.*—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

"IV. COURTS OF INQUIRY

"Art. 97. *When and by whom ordered.*—A court of inquiry to examine into the nature of any transaction of or accusation or imputation against any officer or soldier may be ordered by the President or by any commanding officer; but a court of inquiry shall not be ordered by any commanding officer except upon the request of the officer or soldier whose conduct is to be inquired into.

"Art. 98. *Composition.*—A court of inquiry shall consist of three or more officers. For each court of inquiry the authority appointing the court shall appoint a recorder.

"Art. 99. *Challenges.*—Members of a court of inquiry may be challenged by the party whose conduct is to be inquired into, but only for cause stated to the court. The court shall determine the relevancy and validity of any challenge, and shall not receive a challenge to more than one member at a time. The party whose conduct is being inquired into shall have the right to be represented before the court by counsel of his own selection, if such counsel be reasonably available.

"Art. 100. *Oath of members and recorder.*—The recorder of a court of inquiry shall administer to the members the following oath: 'You, A. B., do swear (or affirm) that you will well and truly examine and inquire, according to the evidence, into the matter now before you, without partiality, favor, affection, prejudice, or hope of reward. So help you, God.' After which the president of the court shall administer to the recorder the following oath: 'You, A. B., do swear (or affirm) that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you, God.'

"In case of affirmation the closing sentence of adjuration will be omitted.

"Art. 101. *Powers; procedure.*—A court of inquiry and the recorder thereof shall have the same power to summon and examine witnesses as is given to courts-martial and the judge advocate thereof. Such witnesses shall take the same oath or affirmation that is taken by witnesses before courts-martial. A reporter or an interpreter for a court of inquiry shall, before entering upon his duties, take the oath or affirmation required of a reporter or an interpreter for a court-martial. The party whose conduct is being inquired into or his counsel, if any, shall be permitted to examine and cross-examine witnesses so as fully to investigate the circumstances in question.

"Art. 102. *Opinion on merits of case.*—A court of inquiry shall not give an opinion on the merits of the case inquired into unless specially ordered to do so.

"Art. 103. *Record of proceedings—How authenticated.*—Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signature of the president and the recorder thereof, and be forwarded to the convening authority. In case the record can not be authenticated by the recorder, by reason of his death, disability, or absence, it shall be signed by the president and by one other member of the court.

"V. MISCELLANEOUS PROVISIONS

"Art. 104. *Disciplinary powers of commanding officers.*—Under such regulations as the President may prescribe, and which he may from time to time revoke, alter, or add to, the commanding officer of any detachment, company, or higher command may, for minor offenses not denied by the accused, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

"The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges, extra fatigue, and restriction to certain specified limits, but shall not include forfeiture of pay or confinement under guard. A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense, may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a crime or offense growing out of the same act or omission; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

"Art. 105. *Injuries to person or property—Redress of.*—Whenever complaint is made to any commanding officer that damage has been done to the property of any person or that his property has been wrongfully taken by persons subject to military law, such complaint shall be investigated by a board consisting of any number of officers from one to three, which board shall be convened by the commanding officer and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be stopped against the pay of the offenders. And the order of such commanding officer directing stoppages herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the stoppages so ordered.

"Where the offenders can not be ascertained, but the organization or detachment to which they belong is known, stoppages to the amount

of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization or detachment at the time the damages complained of were inflicted as determined by the approved findings of the board.

"Art. 106. *Arrest of deserters by civil officials.*—It shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, District, or possession of the United States, to arrest offenders, summarily to arrest a deserter from the military service of the United States and deliver him into the custody of the military authorities of the United States.

"Art. 107. *Soldiers to make good time lost.*—Every soldier who in an existing or subsequent enlistment deserts the service of the United States or without proper authority absents himself from his organization, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, or through the intemperate use of drugs or alcoholic liquor, or through disease or injury the result of his own misconduct, renders himself unable for more than one day to perform duty, shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement, or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve.

"Art. 108. *Soldiers—Separation from the service.*—No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs or by the commanding officer when no such field officer is present; and no enlisted man shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.

"Art. 109. *Oath of enlistment.*—At the time of his enlistment every soldier shall take the following oath or affirmation: 'I, ———, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Rules and Articles of War.' This oath or affirmation may be taken before any officer.

"Art. 110. *Certain articles to be read and explained.*—Articles one, two, and twenty-nine, fifty-four to ninety-six, inclusive, and one hundred and four to one hundred and nine, inclusive, shall be read and explained to every soldier at the time of his enlistment or muster in, or within six days thereafter, and shall be read and explained once every six months to the soldiers of every garrison, regiment, or company in the service of the United States.

"Art. 111. *Copy of record of trial.*—Every person tried by a general court-martial shall, on demand therefor, made by himself or

by any person in his behalf, be entitled to a copy of the record of the trial.

"Art. 112. *Effects of deceased persons—Disposition of.*—In case of the death of any person subject to military law, the commanding officer of the place or command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters, and if no legal representative or widow be present, the commanding officer shall direct a summary court to secure all such effects; and said summary court shall have authority to convert such effects into cash, by public or private sale, not earlier than thirty days after the death of the deceased, and to collect and receive any debts due decedent's estate by local debtors; and as soon as practicable after converting such effects into cash said summary court shall deposit with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposit, accompanied by any will or other papers of value belonging to the deceased, an inventory of the effects secured by said summary court, and a full account of his transactions to the War Department for transmission to the Auditor for the War Department for action as authorized by law in the settlement of the accounts of deceased officers or enlisted men of the Army; but if in the meantime the legal representative, or widow, shall present himself or herself to take possession of decedent's estate the said summary court shall turn over to him or her all effects not sold and cash belonging to said estate, together with an inventory and account, and make to the War Department a full report of his transactions.

"The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia where sent from the home for treatment.

"Art. 113. *Inquests.*—When at any post, fort, camp, or other place garrisoned by the military forces of the United States and under the exclusive jurisdiction of the United States, any person shall have been found dead under circumstances which appear to require investigation, the commanding officer will designate and direct a summary court-martial to investigate the circumstances attending the death; and, for this purpose, such summary court-martial shall have power to summon witnesses and examine them upon oath or affirmation. He shall promptly transmit to the post or other commander a report of his investigation and of his findings as to the cause of the death.

"Art. 114. *Authority to administer oaths.*—Any judge advocate or acting judge advocate, the president of a general or special court-martial, any summary court-martial, the judge advocate or any assistant judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and in foreign places where the Army may be serving shall have the general powers of a notary public or of a consul of the United States in the adminis-

tration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents, and all other forms of notarial acts to be executed by persons subject to military law.

"Art. 115. *Appointment of reporters and interpreters.*—Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission, or a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission and may set down the same, in the first instance, in shorthand. Under like regulations the president of a court-martial or military commission, or court of inquiry, or a summary court, may appoint an interpreter, who shall interpret for the court or commission.

"Art. 116. *Powers of assistant judge advocates.*—An assistant judge advocate of a general court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the judge advocate of the court.

"Art. 117. *Removal of civil suits.*—When any civil suit or criminal prosecution is commenced in any court of a State against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed in section thirty-three of the Act entitled 'An Act to codify, revise, and amend the laws relating to the judiciary,' approved March third, nineteen hundred and eleven, and the cause shall thereupon be entered on the docket of said district court and shall proceed therein as if the cause had been originally commenced in said district court and the same proceedings had been taken in such suit or prosecution in said district court as shall have been had therein in said State court prior to its removal, and said district court shall have full power to hear and determine said cause.

"Art. 118. *Officers—Separation from service.*—No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial or in mitigation thereof; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction.

"Art. 119. *Rank and precedence among regulars, militia, and volunteers.*—That in time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade. In the absence of such assignment by the President, officers of the same grade shall rank and have precedence in the follow-

ing order, without regard to date of rank or commission as between officers of different classes, namely: First, officers of the Regular Army and officers of the Marine Corps detached for service with the Army by order of the President; second, officers of forces drafted or called into service of the United States; and, third, officers of the volunteer forces: Provided, That officers of the Regular Army holding commissions in forces drafted or called into the service of the United States or in the volunteer forces shall rank and have precedence under said commissions as if they were commissions in the Regular Army; the rank of officers of the Regular Army under commissions in the National Guard as such shall not, for the purposes of this article, be held to antedate the acceptance of such officers into the service of the United States under said commissions.

"Art. 120. *Command when different corps or commands happen to join.*—When different corps or commands of the military forces of the United States happen to join or do duty together the officer highest in rank of the line of the Regular Army, Marine Corps, forces drafted or called into the service of the United States or Volunteers, there on duty, shall, subject to the provisions of the last preceding article, command the whole and give orders for what is needful in the service, unless otherwise directed by the President.

"Art. 121. *Complaints of wrongs.*—Any officer or soldier who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to the general commanding in the locality where the officer against whom the complaint is made is stationed. The general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon."

Sec. 4. The provisions of section three of this Act shall take effect and be in force on and after the first day of March, nineteen hundred and seventeen: Provided, That articles four, thirteen, fourteen, fifteen, twenty-nine, forty-seven, forty-nine, and ninety-two shall take effect immediately upon the approval of this Act.

Sec. 5. That all offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the taking effect of this Act, under any law embraced in or modified, changed, or repealed by this Act, may be prosecuted, punished, and enforced in the same manner and with the same effect as if this Act had not been passed.

Sec. 6. All laws and parts of laws in so far as they are inconsistent with this Act are hereby repealed.

Approved, August 29, 1916.

[*Amendments.*—See post, No. 21, Army Appropriations Act, July 9, 1918, ch. X, "Amending the Articles of War."]

4. REVISED STATUTES OF THE UNITED STATES, 1878

Sec. 214. *Department of War—Secretary of War.*—There shall be at the seat of Government an Executive Department to be known as the Department of War, and a Secretary of War, who shall be the head thereof.

Sec. 216. *Duties of the Secretary of War.*—The Secretary of War shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to military commissions, the military forces, the warlike stores of the United States, or to other matters respecting military affairs; and he shall conduct the business of the Department in such manner as the President shall direct.

Sec. 217. *Secretary of War custodian of department property, etc.*—The Secretary of War shall have the custody and charge of all the books, records, papers, furniture, fixtures, and other property appertaining to the Department.

Sec. 1094. *Composition of the Army.*—The Army of the United States shall consist of—

One General.

One Lieutenant-General.

Three major-generals.

Six brigadier-generals.

Five regiments of artillery.

Ten regiments of cavalry.

Twenty-five regiments of infantry.

An Adjutant-General's Department.

An Inspector-General's Department.

A Quartermaster's Department.

A Subsistence Department.

A Corps of Engineers.

A battalion of engineer soldiers.

An Ordnance Department.

The enlisted men of the Ordnance Department.

The Medical Department.

The hospital-stewards of the Medical Department.

A Pay Department.

A Chief Signal-Officer.

A Bureau of Military Justice.

Eight judge-advocates.

Thirty post-chaplains.

Four regimental chaplains.

A (post) ordnance-sergeant and a hospital-steward for each military post.

One band, stationed at the Military Academy.

A force of Indian scouts not exceeding one thousand.

The officers of the Army on the retired list.

And the professors and corps of cadets of the United States Military Academy.

Provided, That when a vacancy occurs in the office of General or Lieutenant-General such office shall cease, and all enactments creating or regulating such offices shall, respectively, be held to be repealed.

Sec. 1114. *Brigades and divisions.*—In the ordinary arrangement of the Army two regiments of infantry or of cavalry shall constitute a brigade, and shall be the command of a brigadier-general, and two brigades shall constitute a division, and shall be the command of a major-general; but it shall be in the discretion of the commanding general to vary this disposition whenever he may deem it proper to do so.

Sec. 1115. *Number of enlisted men.*—There shall not be in the Army at one time more than thirty thousand enlisted men.

Sec. 1116. *General qualifications.*—Recruits enlisting in the Army must be effective and able-bodied men, and between the ages of sixteen and thirty-five years, at the time of their enlistment. This limitation as to age shall not apply to soldiers re-enlisting.

Sec. 1117. *Enlistment of minors.*—No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: Provided, That such minor has such parents or guardians entitled to his custody and control.

Sec. 1118. *Persons not to be enlisted.*—No minor under the age of sixteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of (any criminal offense) (a felony) shall be enlisted or mustered into the military service.

Sec. 1119. *Term of enlistment.*—All enlistments in the Army shall be for the term of five years.

Sec. 1133. *Duties of Quartermaster's Department.*—It shall be the duty of the officers of the Quartermaster's Department, under the direction of the Secretary of War, to purchase and distribute to the Army all military stores and supplies, requisite for its use, which other corps are not directed by law to provide; to furnish means of transportation for the Army, its military stores and supplies, and to provide for and pay all incidental expenses of the military service which other corps are not directed to provide for and pay.

Sec. 1146. *The ration.*—Each ration shall consist of one pound and a quarter of beef or three-quarters of a pound of pork, eighteen ounces of bread or flour, and at the rate of ten pounds of coffee, fifteen pounds of sugar, two quarts of salt, four quarts of vinegar, four ounces of pepper, four pounds of soap, and one pound and a half of candles to every hundred rations. The President may make such alterations in the component parts of the ration as a due regard to health and comfort of the Army and economy may require.

Sec. 1147. *Coffee and sugar commuted.*—The Secretary of War may commute the ration of coffee and sugar for the extract of coffee combined with milk and sugar, if he shall believe such commutation to be conducive to the health and comfort of the Army, and not to be more expensive to the Government than the present ration; provided, the same shall be acceptable to the men.

Sec. 1148. *Sugar and coffee in kind.*—The ration of sugar and coffee where issued in kind, shall, when the convenience of the service permits, be issued weekly.

Sec. 1149. *Sales of tobacco.*—Tobacco shall be furnished to the enlisted men by the commissaries of subsistence, at cost prices, exclusive

of the cost of transportation, in such quantities as they may require, not exceeding sixteen ounces per month.

Sec. 1152. *Regulations of supplies.*—The Chief of Engineers is authorized, with the approval of the Secretary of War, to regulate and determine the number, quality, form, and dimensions of the necessary vehicles, pontoons, tools, implements, arms, and other supplies for the use of the battalion of engineer soldiers.

Sec. 1164. *Supplies.*—It shall be the duty of the Chief of Ordnance to furnish estimates, and, under the direction of the Secretary of War, to make contracts and purchases, for procuring the necessary supplies of ordnance and ordnance stores, for the use of the armies of the United States; to direct the inspection and proving of the same, and to direct the construction of all cannon and carriages, ammunition-wagons, traveling forges, artificers' wagons, and of every implement and apparatus for ordnance, and the preparation of all kinds of ammunition and ordnance stores constructed or prepared for said service.

Sec. 1169. *Right of command.*—Officers of the Medical Department of the Army shall not be entitled, in virtue of their rank, to command in the line or in other staff corps.

Sec. 1193. *Chiefs of corps and departments, how selected.*—The Adjutant-General, the Quartermaster-General, the Commissary-General of Subsistence, the Surgeon-General, the Chief of Engineers, the Chief of Ordnance, and the Paymaster-General shall be appointed by selection from the corps to which they belong.

Sec. 1195. *Signal service, rank of chief.*—There shall be one Chief Signal-Officer, with the rank of colonel of cavalry, who shall have charge, under the direction of the Secretary of War, of all signal-duty, and of all books, papers, and apparatus connected therewith.

Sec. 1198. *Bureau of Military Justice, organization.*—The Bureau of Military Justice shall consist of one Judge-Advocate-General, with the rank of brigadier-general, and one assistant judge-advocate-general, with the rank of colonel of cavalry.

Sec. 1199. *Duties of judge-advocate-general.*—The Judge-Advocate-General shall receive, revise, and cause to be recorded the proceedings of all courts-martial, courts of inquiry and military commissions, and perform such other duties as have been performed heretofore by the Judge-Advocate-General of the Army.

Sec. 1200. *Judge-advocates.*—There shall be eight judge-advocates of the Army, with the rank of major of cavalry.

Sec. 1201. *Duties of judge-advocates.*—Judge-advocates shall perform their duties under the direction of the Judge-Advocate-General.

Sec. 1202. *Witnesses compelled to attend.*—Every judge-advocate of a court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of criminal jurisdiction within the State, Territory, or District where such military courts shall be ordered to sit, may lawfully issue.

Sec. 1203. *Reporter.*—The judge-advocate of a military court shall have power to appoint a reporter, who shall record the proceedings of, and testimony taken before, such court, and may set down the same, in the first instance, in short-hand. The reporter shall, before

entering upon his duty, be sworn, or affirmed, faithfully to perform the same.

Sec. 1204. *Promotions, general rule.*—Promotions in the line shall be made through the whole Army, in its several lines of artillery, cavalry, and infantry, respectively. Promotions in the staff of the Army shall be made in the several departments and corps, respectively.

Sec. 1205. *In case of transfers from the line.*—Officers may be transferred from the line to the staff of the Army without prejudice to their rank or promotion in the line; but no officer shall hold, at the same time, an appointment in the line and an appointment in the staff which confer equal rank in the Army. When any officer so transferred has, in virtue of seniority, obtained or become entitled to a grade in his regiment equal to the grade of his commission in the staff, he shall vacate either his commission in the line or his commission in the staff.

Sec. 1209. *Brevets.*—The President, by and with the advice and consent of the Senate, may, in time of war, confer commissions by brevet upon commissioned officers of the Army, for distinguished conduct and public service in presence of the enemy.

Sec. 1210. *Date of brevet commission.*—Brevet commissions shall bear date from the particular action or service for which the officers were brevetted.

Sec. 1211. *Assignment to duty according to brevet rank.*—Officers may be assigned to duty or command according to their brevet rank by special assignment of the President; and brevet rank shall not entitle an officer to precedence or command except when so assigned.

Sec. 1212. *Uniform and title.*—No officer shall be entitled, on account of having been brevetted, to wear, while on duty, any uniform other than that of his actual rank; and no officer shall be addressed in orders or official communications by any title other than that of his actual rank.

Sec. 1219. *Time of actual service considered in fixing rank.*—In fixing relative rank between officers of the same grade and date of appointment and commission, the time which each may have actually served as a commissioned officer of the United States, whether continuously or at different periods, shall be taken into account. And in computing such time, no distinction shall be made between service as a commissioned officer in the Regular Army and service since the 19th day of April, 1861, in the volunteer forces, whether under appointment or commission from the President or from the governor of a state.

Sec. 1222. *Accepting or holding civil office.*—No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated.

Sec. 1229. *Officers dropped for desertion.*—The President is authorized to drop from the rolls of the Army for desertion any officer who is absent from duty three months without leave; and no officer so dropped shall be eligible for re-appointment. And no officer in the military, or naval service shall in time of peace be dismissed

from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.

Sec. 1230. *Officer dismissed by President may demand trial.*—When any officer, dismissed by order of the President, makes, in writing, an application for trial, setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial, to try such officer on the charges on which he shall have been dismissed. And if a court-martial is not so convened within six months from the presentation of such application for trial, or if such court, being convened, does not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void.

Sec. 1232. *Enlisted men not to be used as servants.*—No officer shall use an enlisted man as a servant in any case whatever.

Sec. 1237. *Exemption from arrest.*—No enlisted man shall, during his term of service, be arrested on mesne process, or taken or charged in execution for any debt, unless it was contracted before his enlistment, and amounted to twenty dollars when first contracted.

Sec. 1241. *Sales of stores.*—The President may cause to be sold any military stores which, upon proper inspection or survey, appear to be damaged, or unsuitable for the public service. Such inspection or survey shall be made by officers designated by the Secretary of War, and the sales shall be made under regulations prescribed by him.

Sec. 1242. *Arms and accouterments in possession of persons not soldiers.*—The clothing, arms, military outfits, and accouterments furnished by the United States to any soldier shall not be sold, bartered, exchanged, pledged, loaned, or given away; and the possession of any such property by any person not a soldier or officer of the United States shall be prima-facie evidence of such sale, barter, exchange, pledge, loan, or gift. Such property may be seized and taken from any person, not a soldier or officer of the United States, by any officer, civil or military, of the United States, and shall, thereupon, be delivered to any quartermaster or other officer authorized to receive the same.

Sec. 1243. *Retirement upon officer's own application.*—When an officer has served forty consecutive years as a commissioned officer, he shall, if he makes application therefor to the President, be retired from active service and placed upon the retired list. When an officer has been thirty years in service, he may, upon his own application, in the discretion of the President, be so retired, and placed on the retired list.

Sec. 1244. *After 45 years or at the age of 62.*—When an officer has served forty-five years as a commissioned officer, or is sixty-two years old, he may be retired from active service at the discretion of the President.

Sec. 1245. *For disability.*—When an officer has become incapable of performing the duties of his office, he shall be either retired from active service, or wholly retired from the service, by the President, as hereinafter provided.

Sec. 1257. *Vacancies by retirement.*—When any officer in the line of promotion is retired from active service, the next officer in rank

shall be promoted to his place, according to the established rules of the service; and the same rule of promotion shall be applied, successively, to the vacancies consequent upon such retirement.

Sec. 1262. *Service pay.*—There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service.

Sec. 1263. *Not to exceed forty per centum on yearly pay.*—The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law.

Sec. 1265. *Pay during absence.*—Officers when absent on account of sickness or wounds, or lawfully absent from duty and waiting orders, shall receive full pay; when absent with leave, for other causes, full pay during such absence not exceeding in the aggregate thirty days in one year, and half-pay during such absence exceeding thirty days in one year. When absent without leave, they shall forfeit all pay during such absence, unless the absence is excused as unavoidable.

Sec. 1269. *Allowances.*—No allowance shall be made to officers in addition to their pay except as hereinafter provided.

Sec. 1270. *Allowance of fuel, quarters, and forage.*—Fuel, quarters, and forage may be furnished in kind to officers by the Quartermaster's Department according to law and regulations.

Sec. 1291. *Soldiers' pay not assignable.*—No assignment of pay by a non-commissioned officer or private, previous to his discharge, shall be valid.

Sec. 1292. *Volunteers.*—In all matters relating to the pay and allowances of officers and soldiers of the Army of the United States, the same rules and regulations shall apply to the Regular Army and to volunteer forces mustered into the service of the United States for a limited period.

Sec. 1293. *Rations of enlisted men.*—Sergeants and corporals of ordnance shall be entitled to receive one ration and a half daily. Other enlisted men shall be entitled to receive one ration daily.

Sec. 1296. *Clothing, prescribed by the President.*—The President may prescribe the uniform of the Army and quantity and kind of clothing which shall be issued annually to the troops of the United States.

Sec. 1304. *Accounting for deficiencies.*—In case of deficiency of any article of military supplies, on final settlements of the accounts of any officer charged with the issue of the same, the value thereof shall be charged against the delinquent and deducted from his monthly pay, unless he shall show to the satisfaction of the Secretary of War, by one or more depositions setting forth the circumstances of the case, that said deficiency was not occasioned by any fault on his part. And in case of damage to any military supplies, the value of such damage shall be charged against such officer and deducted from his monthly pay, unless he shall, in like manner, show that such damage was not occasioned by any fault on his part.

Sec. 1625. *Who to be enrolled in the militia.*—Every able-bodied male citizen of the respective States, resident therein, who is of the age

of eighteen years, and under the age of forty-five years, shall be enrolled in the militia.

Sec. 1626. *Enrollment, by whom.*—It shall be the duty of every captain or commanding officer of a company to enroll every such citizen residing within the bounds of his company, and all those who may, from time to time, arrive at the age of eighteen years, or who, being of the age of eighteen years and under the age of forty-five years, come to reside within his bounds.

Sec. 1627. *Notice of enrollment.*—Each captain or commanding officer shall, without delay, notify every such citizen of his enrollment, by a proper non-commissioned officer of his company, who may prove the notice. And any notice or warning to a citizen enrolled, to attend a company, battalion, or regimental muster, which is according to the laws of the State in which it is given for that purpose, shall be deemed a legal notice of the enrollment.

Sec. 1628. *Arms and accouterments.*—Every citizen shall, after notice of his enrollment, be constantly provided with a good musket or firelock of a bore sufficient for balls of the eighteenth part of a pound, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball; or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accoutered, and provided when called out to exercise, or into service, except that when called out on company days to exercise only, he may appear without a knapsack. And all arms, ammunition, and accouterments so provided and required shall be held exempted from all suits, distresses, executions, or sales, for debt or for the payment of taxes. Each commissioned officer shall be armed with a sword or hanger and spontoon.

Sec. 1639. *Care of the wounded.*—If any person, whether officer or soldier, belonging to the militia of any State, and called out into the service of the United States, be wounded or disabled while in actual service, he shall be taken care of and provided for at the public expense.

Sec. 1641. *Privileges of certain corps.*—All corps of artillery, cavalry, and infantry, now existing in any State, which, by any law, custom, or usage thereof, have not been incorporated with the militia, or are not governed by the general regulations thereof, shall be allowed to retain their accustomed privileges, subject, nevertheless, to all other duties required by law in like manner as the other militia.

Sec. 1642. *Orders of President in case of invasion.*—Whenever the United States are invaded, or are in imminent danger of invasion from any foreign nation or Indian tribe, or of rebellion against the authority of the Government of the United States, it shall be lawful for the President to call forth such number of the militia of the State or States, most convenient to the place of danger, or scene of action, as he may deem necessary to repel such invasion, or to suppress such rebellion, and to issue his orders for that purpose to such officers of the militia as he may think proper.

Sec. 1643. *Militia, how apportioned.*—When the militia of more than one State is called into the actual service of the United States by the President, he shall apportion them among such States according to representative population.

Sec. 1644. *Subject to rules of war.*—The militia, when called into the actual service of the United States for the suppression of rebellion against and resistance to the laws of the United States, shall be subject to the same rules and articles of war as the regular troops of the United States.

Sec. 1658. *Courts-martial, how composed.*—Courts-martial for the trial of militia shall be composed of militia officers only.

Sec. 1977. *Equal rights under the law.*—All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Sec. 1979. *Civil action for deprivation of rights.*—Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Sec. 1989. *Aid of the military and naval forces.*—It shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as may be necessary to aid in the execution of judicial process issued under any of the preceding provisions, or as shall be necessary to prevent the violation and enforce the due execution of the provisions of this title.

Sec. 3709. *Advertising for contracts.*—All purchases and contracts for supplies or services in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same when the public exigencies do not require the immediate delivery of the articles or performance of the service. When immediate delivery or performance is required by the public exigency the articles or service required may be procured by open purchase or contract at the places and in the manner in which such articles are usually bought and sold or such services engaged between individuals.

Sec. 3714. *Contracts under direction of Secretary of War.*—All purchases and contracts for supplies or services for the military and naval service shall be made by or under the direction of the chief officers of the Departments of War and of the Navy, respectively. And all agents or contractors for supplies or service as aforesaid shall render their accounts for settlement to the accountant of the proper department for which such supplies or services are required, subject,

nevertheless, to the inspection and revision of the officers of the Treasury in the manner before prescribed.

Sec. 3732. *Unauthorized contracts prohibited.*—No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel quarters, transportation, or medical and hospital supplies, which however, shall not exceed the necessities of the current year.

Sec. 3744. *Formal written contracts—Returns Office.*—It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return.

Sec. 3748. *Sale, barter, etc., of clothing, arms, etc., furnished to soldiers.*—The clothes, arms, military outfits, and accouterments furnished by the United States to any soldier, shall not be sold, bartered, exchanged, pledged, loaned, or given away; and no person, not a soldier or duly authorized officer of the United States, who has possession of any such clothes, arms, military outfits, or accouterments so furnished, and which have been the subjects of any such barter, exchange, pledge, loan, or gift shall have any right, title, or interest therein, but the same may be seized and taken wherever found by any officer of the United States, civil or military, and shall thereupon be delivered to any quartermaster or other officer authorized to receive the same. The possession of any such clothes, arms, military outfits, or accouterments by any person not a soldier or officer of the United States shall be presumptive evidence of such a sale, barter, exchange, pledge, loan, or gift.

Sec. 5297. *Insurrection against a State.*—In case of an insurrection in any State against the government thereof, it shall be lawful for the President, on application of the legislature of such State, or of the executive, when the legislature can not be convened, to call forth such number of the militia of any other State or States, which may be applied for, as he deems sufficient to suppress such insurrection; or, on like application, to employ for the same purposes, such part of the land or naval forces of the United States as he deems necessary.

Sec. 5298. *Insurrection against the government of the United States.*—Whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, or rebellion against the authority of the Government of the United States, it shall become impracticable, in the

judgment of the President, to enforce, by the ordinary course of judicial proceedings, the laws of the United States within any State or Territory, it shall be lawful for the President to call forth the militia of any or all the States, and to employ such parts of the land and naval forces of the United States as he may deem necessary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion, in whatever State or Territory thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed.

Sec. 5299. *Power to suppress insurrection.*—Whenever insurrection, domestic violence, unlawful combinations, or conspiracies in any State so obstructs or hinders the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by the laws for the protection of such rights, privileges, or immunities, and the constituted authorities of such State are unable to protect, or, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States; and in all such cases, or whenever any such insurrection, violence, unlawful combination or conspiracy, opposes or obstructs the laws of the United States, or the due execution thereof, or impedes or obstructs the due course of justice under the same, it shall be lawful for the President, and it shall be his duty, to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary, for the suppression of such insurrection, domestic violence, or combinations.

Sec. 5300. *Proclamation to insurgents to disperse.*—Whenever, in the judgment of the President, it becomes necessary to use the military forces under this title, the President shall forthwith, by proclamation, command the insurgents to disperse and retire peaceably to their respective abodes, within a limited time.

5. CRIMINAL CODE (ACT OF MARCH 4, 1909, 35 STAT. 1089)

Sec. 9 (Comp. St. 1916, § 10173). *Accepting foreign commission.*—Every citizen of the United States who, within the territory or jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district, or people, with whom the United States are at peace, shall be fined not more than two thousand dollars and imprisoned not more than three years.

Sec. 10 (Comp. St. 1916, § 10174). *Enlistments.*—Whoever, within the territory or jurisdiction of the United States, enlists, or enters himself, or hires or retains another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman, on

board of any vessel of war, letter of marque, or privateer, shall be fined not more than one thousand dollars and imprisoned not more than three years.

Sec. 13 (Comp. St. 1916, § 10177). *Military expedition or enterprise.*—Whoever, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be fined not more than three thousand dollars and imprisoned not more than three years.

(This paragraph is founded on section 5286 of the Revised Statutes, which is repealed.)

Sec. 14 (Comp. St. 1916, § 10178). *Use of the military force.*—The district courts shall take cognizance of all complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof. In every case in which a vessel is fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser, or other armed vessel is increased or augmented, or in which any military expedition or enterprise is begun or set on foot, contrary to the provisions and prohibitions of this chapter; and in every case of the capture of a vessel within the jurisdiction or protection of the United States as before defined; and in every case in which any process issuing out of any court of the United States is disobeyed or resisted by any person having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, or of any colony, district, or people, or of any subjects or citizens of any foreign prince or state, or of any colony, district, or people, it shall be lawful for the President, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purpose of taking possession of and detaining any such vessel, with her prizes, if any, in order to enforce the execution of the prohibitions and penalties of this chapter, and the restoring of such prizes in the cases in which restoration shall be adjudged; and also for the purpose of preventing the carrying on of any such expedition or enterprise from the territory or jurisdiction of the United States against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace.

(This paragraph is the same as section 5287 of the Revised Statutes, as amended by the act of February 18, 1875 [18 Stat. 320], which is repealed.)

✓ Sec. 15 (Comp. St. 1916, § 10179). *Same.*—It shall be lawful for the President, or such person as he shall empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be necessary to compel any foreign vessel to depart the United States in all cases in which, by the laws of nations or the treaties of the United States, she ought not to remain within the United States.

(This paragraph is founded on section 5288 of the Revised Statutes, which is repealed.)

Sec. 18 (Comp. St. 1916, § 10182). *Citizens of a foreign State.*—The provisions of this chapter shall not be construed to extend to any subject or citizen of any foreign prince, state, colony, district, or people who is transiently within the United States and enlists or enters himself on board of any vessel of war, letter of marque, or privateer, which at the time of its arrival within the United States was fitted and equipped as such, or hires or retains another subject or citizen of the same foreign prince, state, colony, district, or people who is transiently within the United States to enlist or enter himself to serve such foreign prince, state, colony, district, or people on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, state, colony, district, or people. Nor shall they be construed to prevent the prosecution or punishment of treason, or of any piracy defined by the laws of the United States.

(This paragraph is founded on section 5291 of the Revised Statutes, which is repealed.)

Sec. 22 (Comp. St. 1916, § 10186). *Presence of troops at election.*—Every officer of the Army or Navy, or other person in the civil, military, or naval service of the United States, who orders, brings, keeps, or has under his authority or control any troops or armed men at any place where a general or special election is held in any State, unless such force be necessary to repel armed enemies of the United States, shall be fined not more than five thousand dollars and imprisoned not more than five years.

Sec. 23 (Comp. St. 1916, § 10187). *Preventing voting.*—Every officer or other person in the military or naval service of the United States who, by force, threat, intimidation, order, advice, or otherwise, prevents, or attempts to prevent, any qualified voter of any State from freely exercising the right of suffrage at any general or special election in such State shall be fined not more than five thousand dollars and imprisoned not more than five years.

Sec. 24 (Comp. St. 1916, § 10188). *Attempt to fix qualification of electors.*—Every officer of the Army or Navy who prescribes or fixes, or attempts to prescribe or fix, whether by proclamation, order, or otherwise, the qualifications of voters at any election in any State shall be punished as provided in the preceding section.

Sec. 25 (Comp. St. 1916, § 10189). *Interference with an officer of election.*—Every officer or other person in the military or naval service of the United States who, by force, threat, intimidation, order, or otherwise, compels, or attempts to compel, any officer holding an election in any State to receive a vote from a person not legally qualified to vote, or who imposes, or attempts to impose, any regulations for conducting any general or special election in a State different from those prescribed by law, or who interferes in any manner with any officer of an election in the discharge of his duty, shall be punished as provided in section twenty-three.

Sec. 35 (Comp. St. 1916, § 10199). *Purchase of United States property from soldiers.*—Whoever shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United

States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, shall make or use, or cause to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry; or whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim; or whoever, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the United States or willfully to conceal such money or other property, shall deliver or cause to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt; or whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, shall make or deliver the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both. And whoever shall knowingly purchase or receive in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service, any arms, equipments, ammunition, clothes, military stores, or other public property, whether furnished to the soldier, sailor, officer, or person, under a clothing allowance or otherwise, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall be fined not more than five hundred dollars, and imprisoned not more than two years.

Sec. 36 (Comp. St. 1916, § 10200). *Stealing government property.*—Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of, any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or to be used for the military or naval service, shall be punished as prescribed in the preceding section.

Sec. 38 (Comp. St. 1916, § 10202). *Aiding or abetting with intent to defraud any captor or claimant of property captured as a prize.*—Whoever shall willfully do, or aid or advise in the doing, of any act relating to the bringing in, custody, preservation, sale, or other disposition of any property captured as prize, or relating to any documents or papers connected with the property, or to any deposition or other document or paper connected with the proceedings, with intent to defraud, delay, or injure the United States or any captor or claimant of such property, shall be fined not more than ten thousand dollars, or imprisoned not more than five years, or both.

Sec. 46 (Comp. St. 1916, § 10213). *Robbery, larceny, etc.*—Whoever shall rob another of any kind or description of personal property

belonging to the United States, or shall feloniously take and carry away the same, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both.

Sec. 47 (Comp. St. 1916, § 10214). *Embezzlement, stealing, etc.*—Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

Sec. 48 (Comp. St. 1916, § 10215). *Receiving stolen property.*—Whoever shall receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined by any other person, knowing the same to have been so embezzled, stolen, or purloined, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both; and such person may be tried either before or after the conviction of the principal offender.

6. ACT OF JUNE 18, 1878 (20 STAT. 152, COMP. ST. 1916, § 1992)

Sec. 15. *Restriction upon the use of military force.*—From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress; and no money appropriated by this act shall be used to pay any of the expenses incurred in the employment of any troops in violation of this section and any person wilfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding ten thousand dollars or imprisonment not exceeding two years or by both such fine and imprisonment.

7. ACT OF MARCH 3, 1885 (23 STAT. 350, COMP. ST. 1916, § 6403)

Claims for property lost or destroyed.—The proper accounting officers of the Treasury are hereby authorized and directed to examine into, ascertain, and determine the value of the private property belonging to officers and enlisted men in the military service of the United States which has been, or may hereafter, be, lost or destroyed in the military service, under the following circumstances:

First. When such loss or destruction was without fault or negligence on the part of the claimant.

Second. Where the private property so lost or destroyed was shipped on board an unseaworthy vessel by order of any officer authorized to give such order or direct such shipment.

Third. Where it appears that the loss or destruction of the private property of the claimant was in consequence of his having given his attention to the saving of the property belonging to the United States

which was in danger at the same time and under similar circumstances. And the amount of such loss so ascertained and determined shall be paid out of any money in the Treasury not otherwise appropriated, and shall be in full for all such loss or damage: Provided, That any claim which shall be presented and acted on under authority of this act shall be held as finally determined, and shall never thereafter be reopened or considered: And provided further, That this act shall not apply to losses sustained in time of war or hostilities with Indians: And provided further, That the liability of the Government under this act shall be limited to such articles of personal property as the Secretary of War, in his discretion, shall decide to be reasonable, useful, necessary, and proper for such officer or soldier while in quarters, engaged in the public service, in the line of duty: And provided further, That all claims now existing shall be presented within two years and not after from the passage of this act; and all such claims hereafter arising be presented within two years from the occurrence of the loss or destruction.

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8. ACT OF AUGUST 1, 1894 (28 STAT. 216, COMP. ST. 1916, § 1888),
AS AMENDED BY ACT OF MARCH 2, 1899, § 4 (30 STAT.
978, COMP. ST. 1916, § 1889)

Sec. 2. *Age, citizenship.*—In time of peace no person (except an Indian) who is not a citizen of the United States, or who has not made legal declaration of his intention to become a citizen of the United States, or who can not speak, read, and write the English language, or who is over thirty-five years of age, shall be enlisted for the first enlistment in the army.

✓ *Term of enlistment.*—Hereafter all enlistments in the Army shall be for the term of three years, and no soldier shall be again enlisted in the Army whose service during his last preceding term of enlistment has not been honest and faithful.

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9. ACT OF APRIL 22, 1898 (30 STAT. 361)

Section 1 (Comp. St. 1916, § 1714). *Composition of national forces.*—All able-bodied male citizens of the United States, and persons of foreign birth who shall have declared their intention to become citizens of the United States under and in pursuance of the laws thereof, between the ages of eighteen and forty-five years, are hereby declared to constitute the national forces, and, with such exceptions and under such conditions as may be prescribed by law, shall be liable to perform military duty in the service of the United States.

Sec. 2. (Comp. St. 1916, § 1715). *Organized and active land forces.*—The organized and active land forces of the United States shall consist of the Army of the United States and of the militia of the several States when called into the service of the United States: Provided, That in time of war the Army shall consist of two branches which shall be designated, respectively, as the Regular Army and the Volunteer Army of the United States.

Sec. 3 (Comp. St. 1916, § 1716). *Regular Army*.—The Regular Army is the permanent military establishment, which is maintained both in peace and war according to law.

10. ACT OF FEBRUARY 2, 1901 (31 STAT. 748)

Section 1. (Comp. St. 1916, § 1717). *Composition of Regular Army*.—From and after the approval of this act the Army of the United States, including the existing organizations, shall consist of:

Fifteen regiments of cavalry.

A corps of artillery.

Thirty regiments of infantry.

One Lieutenant-General.

Six major-generals.

Fifteen brigadier-generals.

An Adjutant-General's Department.

An Inspector-General's Department.

A Judge-Advocate General's Department.

A Quartermaster's Department.

A Subsistence Department.

A Pay Department.

A Medical Department.

A Corps of Engineers.

An Ordnance Department.

A Signal Corps.

The officers of the Record and Pension Office.

The Chaplains.

The officers and enlisted men of the Army on the retired list.

The professors, the Corps of Cadets, the Army Detachments, and band of the Military Academy.

Indian Scouts, as now authorized by law; and such other officers and men as may hereinafter be provided for.

Sec. 36 (Comp. St. 1916, § 1741). *Enlisted strength of the Army*.—The total enlisted force of the line of the Army, together with such native force, shall not exceed, at any one time, one hundred thousand.

11. ACT OF FEBRUARY 14, 1903 (32 STAT. 830)

Section 1 (Comp. St. 1916, § 1759). *Establishment of General Staff Corps*.—There is hereby established a General Staff Corps, to be composed of officers detailed from the Army at large, under such rules as may be prescribed by the President.

Sec. 2 (Comp. St. 1916, § 1760). *Duties of*.—The duties of the General Staff Corps shall be to prepare plans for the national defense and for the mobilization of the military forces in time of war; to investigate and report upon all questions affecting the efficiency of the Army and its state of preparation for military operations; to render professional aid and assistance to the Secretary of War and to general officers and other superior commanders, and to act as their agents

in informing and coordinating the action of all the different officers who are subject under the terms of this Act to the supervision of the Chief of Staff; and to perform such other military duties not otherwise assigned by law as may be from time to time prescribed by the President.

Sec. 4 (Comp. St. 1916, § 1763). *Duties of the Chief of Staff.*—The Chief of Staff, under the direction of the President or of the Secretary of War, under the direction of the President, shall have supervision of all troops of the line and of the Adjutant-General's, Inspector-General's, Judge-Advocate's, Quartermaster's, Subsistence, Medical, Pay and Ordnance departments, the Corps of Engineers, and the Signal Corps, and shall perform such other military duties not otherwise assigned by law as may be assigned to him by the President.

12. ACT OF MAY 27, 1908 (35 STAT. 399)

Section 1. *Composition of the organized militia.*—The militia shall consist of every able-bodied male citizen of the respective States and Territories and the District of Columbia, and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age, and shall be divided into two classes: The organized militia, to be known as the National Guard of the State, Territory, or District of Columbia, or by such other designations as may be given them by the laws of the respective States or Territories; the remainder to be known as the Reserve Militia: Provided, That the provisions of this Act and of section sixteen hundred and sixty-one, Revised Statutes, as amended, shall apply only to the militia organized as a land force.

Sec. 2. *Organization.*—The regularly enlisted, organized, and uniformed active militia in the several States and Territories and the District of Columbia who have heretofore participated or shall hereafter participate in the apportionment of the annual appropriation provided by section sixteen hundred and sixty-one of the Revised Statutes of the United States, as amended, whether known and designated as National Guard, Militia, or otherwise, shall constitute the organized militia. On and after January twenty-first, nineteen hundred and ten, the organization, armament, and discipline of the organized militia in the several States and Territories and the District of Columbia shall be the same as that which is now or may hereafter be prescribed for the Regular Army of the United States, subject in time of peace to such general exceptions as may be authorized by the Secretary of War.

Sec. 3. *Calling forth the militia.*—Whenever the United States is invaded or in danger of invasion from any foreign nation, or of rebellion against the authority of the Government of the United States, or the President is unable with the regular forces at his command to execute the laws of the Union, it shall be lawful for the President to call forth such number of the militia of the State or of the States or Territories or of the District of Columbia as he may deem necessary to repel such invasion, suppress such rebellion, or to enable him to execute such laws, and to issue his orders for that purpose, through

the governor of the respective State or Territory, or through the commanding general of the militia of the District of Columbia, from which State, Territory, or District such troops may be called, to such officers of the militia as he may think proper.

Sec. 4. *The same*.—When the military needs of the Federal Government arising from the necessity to execute the laws of the Union, suppress insurrection, or repel invasion, can not be met by the regular forces, the organized militia shall be called into the service of the United States in advance of any volunteer force which it may be determined to raise.

Term of service.—Whenever the President calls forth the organized militia of any State, Territory, or of the District of Columbia, to be employed in the service of the United States, he may specify in his call the period for which such service is required, and the militia so called shall continue to serve during the term so specified, either within or without the territory of the United States, unless sooner relieved by order of the President.

No commissioned officer or enlisted man of the organized militia shall be held to service beyond the term of his existing commission or enlistment.

Sec. 5. *Enlistment and muster*.—Every officer and enlisted man of the militia who shall be called forth in the manner hereinbefore prescribed, shall be mustered for service without further enlistment, and without further medical examination previous to such muster, except for those States and Territories which have not adopted the standard of medical examination prescribed for the Regular Army.

Sec. 6 (Comp. St. 1916, § 3049). *Membership of courts-martial*.—The majority membership of courts-martial for the trial of officers or men of the militia when in the service of the United States shall be composed of militia officers.

13. ACT OF FEBRUARY 18, 1909 (35 STAT. 634)

Sec. 50. *Parades, etc., to have right of way*.—The United States forces or troops, or any portion of the militia, parading, or performing any duty according to law, shall have the right of way in any street or highway through which they may pass: Provided, That the carriage of the United States mails, the legitimate functions of the police, and the progress and operations of fire-engines and fire departments shall not be interfered with thereby.

14. ACT OF MARCH 1, 1911 (36 STAT. 963, COMP. ST. 1916, § 10496)

Discrimination against persons wearing uniforms.—Hereafter no proprietor, manager, or employee of a theater or other public place of entertainment or amusement in the District of Columbia, or in any Territory, the District of Alaska or Insular possession of the United States, shall make, or cause to be made, any discrimination against any person lawfully wearing the uniform of the Army, Navy, Revenue-Cutter Service or Marine Corps of the United States because of

that uniform, and any person making, or causing to be made, such discrimination shall be guilty of a misdemeanor, punishable by a fine not exceeding five hundred dollars.

15. JOINT RESOLUTION OF MARCH 14, 1912 (37 STAT. 630, COMP. ST. 1916, §§ 7677, 7678)

President empowered to issue neutrality proclamation.—The joint resolution to prohibit the export of coal or other material used in war from any seaport of the United States, approved April twenty-second, eighteen hundred and ninety-eight, be, and hereby is, amended to read as follows:

Whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export except under such limitations and exceptions as the President shall prescribe any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or of Congress.

Sec. 2. Any shipment of material hereby declared unlawful after such a proclamation shall be punishable by fine not exceeding ten thousand dollars, or imprisonment not exceeding two years, or both.

16. ACT OF MARCH 4, 1915 (38 STAT. 1074)

Sec. 2, Par. 1. *Military prison, United States and branches, name changed to United States Disciplinary Barracks.*—The United States military prison at Fort Leavenworth, Kansas, shall hereafter be known as the United States Disciplinary Barracks and the branches of said prison as branches of such barracks.

Par. 2. *Military offenses punishable in a penitentiary, confinement may be in United States, State, Territory, or District penitentiary.*—Persons sentenced to confinement upon conviction by courts-martial or other military tribunals of crimes or offenses which, under some statute of the United States or under some law of the State, Territory, District, or other jurisdiction in which the crime or offense may be committed, are punishable by confinement in a penitentiary, including persons sentenced to confinement upon conviction by courts-martial or other military tribunals of two or more acts or omissions, any one of which, under the statute or other law hereinbefore mentioned, constitutes or includes a crime or offense punishable by confinement in a penitentiary, may be confined at hard labor, during the entire period of confinement so adjudged, in any United States, State, Territorial, or District penitentiary, or in any other penitentiary directly or indirectly under the jurisdiction of the United States; and all persons sentenced to confinement upon conviction by courts-martial or other military tribunals who are not confined in a penitentiary may be confined and detained in the United States Disciplinary Barracks.

Par. 3. *Government and control of disciplinary barracks vested in the Adjutant General.*—The government and control of the United States Disciplinary Barracks and of all offenders sent thereto for confinement and detention therein shall be vested in the Adjutant General of the Army under the direction of the Secretary of War, who shall from time to time make such regulations respecting the same as may be deemed necessary, and who shall submit annually to Congress a full statement of the financial and other affairs of said institution for the preceding fiscal year.

Par. 4. *Commandant and other commissioned and noncommissioned officers, etc., at, composition of.*—The officers of the United States Disciplinary Barracks shall consist of a commandant and such subordinate officers as may be necessary, who shall be detailed by the Secretary of War from the commissioned officers of the Army at large. In addition to detailing for duty at said disciplinary barracks such number of enlisted men of the Staff Corps and departments as he may deem necessary, the Secretary of War shall assign a sufficient number of enlisted men of the line of the Army for duty as guards at said disciplinary barracks and as noncommissioned officers of the disciplinary organizations hereinafter authorized. Said guards, and also the enlisted men assigned for duty as noncommissioned officers of disciplinary organizations, shall be detached from the line of the Army, or enlisted for the purpose; and said guards shall be organized as infantry, with noncommissioned officers, musicians, artificers, and cooks of the number and grades allowed by law for infantry organizations of like strength: Provided, That at least one of said guards shall have the rank, pay, and allowances of a battalion sergeant major.

Par. 5. *Duties of the commandant.*—The commandant of the United States Disciplinary Barracks shall have command thereof and charge and custody of all offenders sent thereto for confinement and detention therein; shall govern such offenders and cause them to be employed at such labor and in such trades and to perform such duties as may be deemed best for their health and reformation and with a view to their honorable restoration to duty or their reenlistment as hereinafter authorized; shall cause note to be taken and a record to be made of the conduct of such offenders; and may shorten the daily time of hard labor of those who by their obedience, honesty, industry, and general good conduct earn such favors—all under such regulations as the Secretary of War may from time to time prescribe.

Par. 6. *Organization of disciplinary companies and higher units, etc.*—The Secretary of War shall provide for placing under military training those offenders sent to the United States Disciplinary Barracks for confinement and detention therein whose record and conduct are such as to warrant the belief that upon the completion of a course of military training they may be worthy of an honorable restoration to duty or of being permitted to reenlist; may provide for the organization of offenders so placed under military training into disciplinary companies and higher units, organized as infantry, with noncommissioned officers, except color sergeants, selected or appointed from the enlisted men assigned to duty for that purpose pursuant to

the provisions of paragraph four hereof; and may provide for uniforming, arming, and equipping such organizations.

Par. 7. *Clemency and restoration to colors of persons not discharged and re-enlistment of discharged persons.*—Whenever he shall deem such action merited the Secretary of War may remit the unexecuted portions of the sentences of offenders sent to the United States Disciplinary Barracks for confinement and detention therein and in addition to such remission may grant those who have not been discharged from the Army an honorable restoration to duty, and may authorize the reenlistment of those who have been discharged or upon their written application to that end order their restoration to the Army to complete their respective terms of enlistment, and such application and order of restoration shall be effective to revive the enlistment contract for a period equal to the one not served under said contract.

Par. 8. *Secretary of War may designate branch disciplinary barracks.*—The Secretary of War may, from time to time, designate any building or structure or any part thereof under the control of the Secretary of War and pertaining to the military establishment as a branch disciplinary barracks for the confinement and detention of offenders whom it is impracticable to send to the United States Disciplinary Barracks at Fort Leavenworth, Kansas; and all branch disciplinary barracks and all offenders sent thereto for confinement and detention therein shall be subject to the laws respecting the United States Disciplinary Barracks at Fort Leavenworth, Kansas, and the offenders sent thereto for confinement and detention therein.

Par. 9. *Parole of general prisoners in disciplinary barracks, and restoration to duty of those serving confinement in places other than disciplinary barracks.*—The authority now vested in the Secretary of War to give an honorable restoration to duty, in case the same is merited, to general prisoners confined in the United States disciplinary barracks and its branches shall be extended so that such restoration may be given to general prisoners confined elsewhere, and the Secretary of War shall be, and he is hereby, authorized to establish a system of parole for prisoners confined in said barracks and its branches, the terms and conditions of such parole to be such as the Secretary of War may prescribe.

17. ACT OF MARCH 4, 1915 (38 STAT. 1078)

Contracts entered into by Quartermaster Corps, certain ones to be reduced to writing, etc.—Hereafter whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Quartermaster General, or by officers of the Quartermaster Corps authorized to make them, and are in excess of \$500 in amount, such contracts shall be reduced to writing and signed by the contracting parties. In all other cases contracts shall be entered into under such regulations as may be prescribed by the Quartermaster General.

18. ACT OF AUGUST 29, 1916 (39 STAT. 622)

Contracts entered into by Signal Corps, certain ones to be reduced to writing, etc.—Hereafter whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Chief Signal Officer, or by officers of the Signal Corps authorized to make them, and are in excess of \$500 in amount, such contracts shall be reduced to writing and signed by the contracting parties. In all other cases contracts shall be entered into under such regulations as may be prescribed by the Chief Signal Officer.

Contracts entered into by Medical Department, certain ones to be reduced to writing, etc.—Hereafter, whenever contracts which are not to be performed within sixty days are made on behalf of the Government by the Surgeon General or by officers of the Medical Department authorized to make them, and are in excess of \$500 in amount, such contracts shall be reduced to writing and signed by the contracting parties, but in all other cases contracts shall be prepared under such regulations as may be prescribed by the Surgeon General.

B. JUDICIAL OPINIONS

1. MILITARY AND CIVIL JURISDICTION CONTRASTED—WAR POWERS

(a) State and Federal Military Powers and Relations

1. HOUSTON v. MOORE.

(Supreme Court of the United States, 1820. 5 Wheat. 1, 5 L. Ed. 19.)

This was a writ of error to the supreme court of the State of Pennsylvania, in a case where was drawn in question the validity of a statute of that State, on the ground of its repugnancy to the constitution and laws of the United States, and the decision was in favor of its validity. The statute which formed the ground of controversy in the state court, was passed on the 28th of March, 1814, and enacts, among other things, (sec. 21,) that every non-commissioned officer and private of the militia who shall have neglected or refused to serve when called into actual service, in pursuance of any order or requisition of the President of the United States, shall be liable to the penalties defined in the act of the congress of the United States, passed on the 28th of February, 1795; and then proceeds to enumerate them, and to each clause adds: "or shall be liable to any penalty which may have been prescribed since the date of the passing of the said act, or which may hereafter be prescribed by any law of the United States." The statute then further provides that, "within one month after the expiration of the time for which any detachment of militia shall have been called into the service of the United States, by or in pursuance of orders from the President of the United States, the proper brigade inspector shall summon a general or a regimental court-martial, as the case may be, for the trial of such person or persons belonging to the detachment called out, who shall have refused or neglected to march therewith, or to furnish a sufficient substitute; or, who, after having marched therewith, shall have returned, without leave from his commanding officer, of which delinquents the proper brigade inspector shall furnish to the said court-martial an accurate list. And as soon as the said court-martial shall have decided in each of the cases which shall be submitted to their consideration, the President thereof shall furnish to the marshal of the United States, or to his deputy, and also to the comptroller of the treasury of the United States, a list of the delinquents fined, in order that further proceedings directed to be had thereon by the laws of the United States, may be completed."

Houston, the plaintiff in error, and in the original suit, was a private, enrolled in the Pennsylvania militia, and belonging to the detachment of the militia which was ordered out by the governor of that State, in pursuance of a requisition from the President of the United States, dated the 4th of July, 1814. Being duly notified and

called upon, he neglected to march with the detachment to the appointed place of rendezvous. He was tried for this delinquency before a court-martial summoned under the authority of the executive of that State, in pursuance of the section of the statute above referred to. He appeared before the court-martial, pleaded not guilty, and was in due form sentenced to pay a fine; for levying of which on his property, he brought an action of trespass in the state court of common pleas, against the deputy marshal by whom it was levied. At the trial in that court, the plaintiff prayed the court to instruct the jury, that the first, second, and third paragraphs of the 21st section of the above statute of Pennsylvania, so far as they related to the militia called into the service of the United States, under the laws of congress, and who failed to obey the orders of the President of the United States, are contrary to the constitution of the United States, and the laws of congress made in pursuance thereof, and are, therefore, null and void. The court instructed the jury that these paragraphs were not contrary to the constitution or laws of the United States, and were, therefore, not null and void. A verdict and judgment was thereupon rendered for the defendant, Moore; which judgment being carried by writ of error before the supreme court of Pennsylvania, the highest court of law or equity of that State, was affirmed; and the cause was then brought before this court, under the 25th section of the Judiciary Act, (1 Stats. at Large, 85.)

This cause was argued at the last term, and continued to the present term for advisement.

The judgment of the court was delivered at the present term by WASHINGTON, J., who, after stating the facts of the case, proceeded as follows:

There is but one question in this cause, and it is, whether the act of the legislature of Pennsylvania, under the authority of which the plaintiff in error was tried, and sentenced to pay a fine, is repugnant to the constitution of the United States, or not?

But before this question can be clearly understood, it will be necessary to inquire, 1. What are the powers granted to the general government, by the constitution of the United States, over the militia? and, 2. To what extent they have been assumed and exercised?

1. The constitution declares that congress shall have power to provide for calling forth the militia in three specified cases: for organizing, arming, and disciplining them; and for governing such part of them as may be employed in the service of the United States; reserving to the States, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress. It is further provided, that the President of the United States shall be commander of the militia, when called into the actual service of the United States.

2: After the constitution went into operation, congress proceeded, by many successive acts, to exercise these powers, and to provide for all the cases contemplated by the constitution.

The act of the 2d of May, 1792, (1 Stats. at Large, 259,) which is reenacted almost verbatim by that of the 28th of February, 1795, authorizes the President of the United States, in case of invasion, or of

imminent danger of it, or when it may be necessary for executing the laws of the United States, or to suppress insurrections, to call forth such number of the militia of the States most convenient to the scene of action, as he may judge necessary, and to issue his orders for that purpose to such officer of the militia as he shall think proper. It prescribes the amount of pay and allowances of the militia so called forth, and employed in the service of the United States, and subjects them to the rules and articles of war applicable to the regular troops. It then proceeds to prescribe the punishment to be inflicted upon delinquents, and the tribunal which is to try them, by declaring that every officer or private who should fail to obey the orders of the President in any of the cases before recited should be liable to pay a certain fine, to be determined and adjusted by a court-martial, and to be imprisoned, by a like sentence, on failure of payment. The courts-martial for the trial of militia, are to be composed of militia officers only, and the fines to be certified by the presiding officer of the court, to the marshal of the district, and to be levied by him, and, also, to the supervisor, to whom the fines are to be paid over.

The act of the 18th of April, 1814, (3 Stats. at Large, 134,) provides that courts-martial, to be composed of militia officers only, for the trial of militia, drafted, detached, and called forth for the service of the United States, whether acting in conjunction with the regular forces or otherwise, shall, whenever necessary, be appointed, held, and conducted in the manner prescribed by the rules and articles of war, for appointing, holding, and conducting courts-martial for the trial of delinquents in the army of the United States. Where the punishment prescribed is by stoppage of pay or imposing a fine, limited by the amount of pay, the same is to have relation to the monthly pay existing at the time the offence was committed. The residue of the act is employed in prescribing the manner of conducting the trial; the rules of evidence for the government of the court; the time of service and other matters not so material to the present inquiry. The only remaining act of congress which it will be necessary to notice in this general summary of the laws, is that of the 8th of May, 1792, (1 Stats. at Large, 271,) for establishing a uniform militia in the United States. It declares who shall be subject to be enrolled in the militia and who shall be exempt; what arms and accoutrements the officers and privates shall provide themselves with; arranges them into divisions, brigades, regiments, battalions, and companies, in such manner as the state legislatures may direct; declares the rules of discipline by which the militia is to be governed, and makes provision for such as should be disabled whilst in the actual service of the United States. The pay and subsistence of the militia, whilst in service, are provided for by other acts of congress, and particularly by one passed on the 3d (2d?) of January, 1795, (1 Stats. at Large, 408.)

The laws which I have referred to, amount to a full execution of the powers conferred upon congress by the constitution. They provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasion. They also provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States;

leaving to the States respectively the appointment of the officers, and the authority of training them according to the discipline prescribed by congress.

This system may not be formed with as much wisdom as, in the opinion of some, it might have been, or as time and experience may hereafter suggest. But, to my apprehension, the whole ground of congressional legislation is covered by the laws referred to. The manner in which the militia is to be organized, armed, disciplined, and governed, is fully prescribed; provisions are made for drafting, detaching, and calling forth the state quotas, when required by the President. The President's orders may be given to the chief executive magistrate of the State, or to any militia officer he may think proper; neglect or refusal to obey orders is declared to be an offence against the laws of the United States, and subjects the offender to trial, sentence, and punishment, to be adjudged by a court-martial, to be summoned in the way pointed out by the articles and rules of war; and the mode of proceeding to be observed by these courts, is detailed with all necessary perspicuity.

If I am not mistaken in this view of the subject, the way is now open for the examination of the great question in the cause. Is it competent to a court-martial, deriving its jurisdiction under state authority, to try and to punish militia-men, drafted, detached, and called forth by the President into the service of the United States, who have refused or neglected to obey the call?

In support of the judgment of the court below, I understand the leading arguments to be the two following: 1. That militia-men, when called into the service of the United States by the President's orders, communicated either to the executive magistrate or to any inferior militia officer of a State, are not to be considered as being in the service of the United States until they are mustered at the place of rendezvous. If this be so, then, 2. The State retains a right, concurrent with the government of the United States, to punish his delinquency. It is admitted on the one side, that so long as the militia are acting under the military jurisdiction of the State to which they belong, the powers of legislation over them are concurrent in the general and state government. Congress has power to provide for organizing, arming, and disciplining them; and this power being unlimited, except in the two particulars of officering and training them, according to the discipline to be prescribed by congress, it may be exercised to any extent that may be deemed necessary by congress. But as state militia, the power of the state governments to legislate on the same subjects, having existed prior to the formation of the constitution, and not having been prohibited by that instrument, it remains with the States, subordinate, nevertheless, to the paramount law of the general government, operating upon the same subject. On the other side, it is conceded, that after a detachment of the militia have been called forth, and have entered into the service of the United States, the authority of the general government over such detachment is exclusive. This is also obvious. Over the national militia the state governments never had or could have jurisdiction. None such is conferred by the constitution of the United States; consequently, none such can exist.

The first question then is, at what time and under what circumstances does a portion of militia, drafted, detached, and called forth by the President, enter into the service of the United States, and change their character from state to national militia? That congress might, by law, have fixed the period by confining it to the draft; the order given to the chief magistrate or other militia officer of the State; to the arrival of the men at the place of rendezvous, or to any other circumstance, I can entertain no doubt. This would certainly be included in the more extensive powers of calling forth the militia, organizing, arming, disciplining, and governing them. But has congress made any declaration on this subject, and in what manner is the will of that body, as expressed in the before-mentioned laws, to be construed? It must be conceded, that there is no law of the United States which declares, in express terms, that the organizing, arming, and equipping a detachment, on the order of the President to the state militia officers or to the militia-men personally, places them in the service of the United States. It is true, that the refusal or neglect of the militia to obey the orders of the President, is declared to be an offence against the United States, and subjects the offender to a certain prescribed punishment. But this flows from the power bestowed upon the general government to call them forth; and, consequently, to punish disobedience to a legal order; and by no means proves that the call of the President places the detachment in the service of the United States. But although congress has been less explicit on this subject than they might have been and it could be wished they had been, I am, nevertheless, of opinion, that a fair construction of the different militia laws of the United States will lead to a conclusion that something more than organizing and equipping a detachment, and ordering it into service, was considered as necessary to place the militia in the service of the United States. That preparing a detachment for such service, does not place it in the service, is clearly to be collected from the various temporary laws which have been passed, authorizing the President to require of the state executives to organize, arm, and equip their state quotas of militia for the service of the United States. Because they all provide that the requisition shall be to hold such quotas in readiness to march at a moment's warning; and some, if not all of them, authorize the President to call into actual service any part or the whole of said quotas or detachments; clearly distinguishing between the orders of the President to organize and hold the detachments in readiness for service and their entering into service.

The act of the 28th of February, 1795, declares, that the militia employed in the service of the United States, shall receive the same pay and allowance as the troops of the United States, and shall be subject to the same rules and articles of war. The provisions made for disabled militia-men, and for their families, in case of their death, are, by other laws, confined to such militia as are, or have been, in actual service. There are other laws which seem very strongly to indicate the time at which they are considered as being in service. Thus, the act of the 28th of February, 1795, declares, that a militiaman called into the service of the United States, shall not be compelled to serve more than three months after his arrival at the place

of rendezvous, in any one year. The 8th section of the act of the 18th of April, 1814, declares, that the militia, when called into the service of the United States, if, in the President's opinion, the public interest requires it, may be compelled to serve for a term not exceeding six months, after their arrival at the place of rendezvous, in any one year; and by the 10th section, provision is made for the expenses which may be incurred by marching the militia to their places of rendezvous, in pursuance of a requisition of the President, and they are to be adjusted and paid in like manner as those incurred after their arrival at the rendezvous. The 3d section of the act of the 2d of January, 1795, provides, that whenever the militia shall be called into the actual service of the United States, their pay shall be deemed to commence from the day of their appearing at the place of battalion, regimental, or brigade rendezvous, allowing a day's pay and ration for every fifteen miles from their homes to said rendezvous.

From this brief summary of the laws, it would seem, that actual service was considered by congress as the criterion of national militia; and that the service did not commence until the arrival of the militia at the place of rendezvous. That is the terminus a quo, the service, the pay, and subjection to the articles of war, are to commence and continue. If the service, in particular, is to continue for a certain length of time, from a certain day, it would seem to follow, almost conclusively, that the service commenced on that, and not on some prior day. And, indeed, it would seem to border somewhat upon an absurdity, to say, that a militia-man was in the service of the United States at any time, who, so far from entering into it for a single moment, had refused to do so, and who never did any act to connect him with such service. It has already been admitted, that if congress had pleased so to declare, a militia-man, called into the service of the United States, might have been held and considered as being constructively in that service, though not actually so; and might have been treated in like manner as if he had appeared at the place of rendezvous. But congress has not so declared, nor have they made any provision applicable to such a case; on the contrary, it would appear, that a fine to be paid by the delinquent militia-man, was deemed an equivalent for his services, and an atonement for his disobedience.

If, then, a militia-man, called into the service of the United States, shall refuse to obey the order, and is, consequently, not to be considered as in the service of the United States, or removed from the military jurisdiction of the State to which he belongs, the next question is, is it competent to the State to provide for trying and punishing him for his disobedience, by a court-martial, deriving its authority under the State? It may be admitted at once, that the militia belong to the States, respectively, in which they are enrolled, and that they are subject, both in their civil and military capacities, to the jurisdiction and laws of such State, except so far as those laws are controlled by acts of congress constitutionally made. Congress has power to provide for organizing, arming, and disciplining the militia; and it is presumable, that the framers of the constitution contemplated a full exercise of all these powers. Nevertheless, if congress had declined to exercise them, it was competent to the state govern-

ments to provide for organizing, arming, and disciplining their respective militia, in such manner as they might think proper. But congress has provided for all these subjects, in the way which that body must have supposed the best calculated to promote the general welfare, and to provide for the national defence. After this, can the state governments enter upon the same ground—provide for the same objects as they may think proper, and punish, in their own way, violations of the laws they have so enacted? The affirmative of this question is asserted by the defendant's counsel, who, it is understood, contend, that unless such state laws are in direct contradiction to those of the United States, they are not repugnant to the constitution of the United States.

From this doctrine, I must, for one, be permitted to dissent. The two laws may not be in such absolute opposition to each other, as to render the one incapable of execution, without violating the injunctions of the other; and yet, the will of the one legislature may be in direct collision with that of the other. This will is to be discovered as well by what the legislature has not declared, as by what they have expressed. Congress, for example, has declared, that the punishment for disobedience of the act of congress, shall be a certain fine; if that provided by the state legislature for the same offence be a similar fine, with the addition of imprisonment or death, the latter law would not prevent the former from being carried into execution, and may be said, therefore, not to be repugnant to it. But surely the will of congress is, nevertheless, thwarted and opposed.

This question does not so much involve a contest for power between the two governments, as the rights and privileges of the citizen, secured to him by the constitution of the United States, the benefit of which he may lawfully claim.

If, in a specified case, the people have thought proper to bestow certain powers on congress as the safest depository of them, and congress has legislated within the scope of them, the people have reason to complain that the same powers should be exercised at the same time by the state legislatures. To subject them to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my apprehension, something very much like oppression, if not worse. In short, I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with each other. If they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other, so far as they do differ. If the one imposes a certain punishment for a certain offence, the presumption is, that this was deemed sufficient, and, under all circumstances, the only proper one. If the other legislature impose a different punishment, in kind or degree, I am at a loss to conceive how they can both consist harmoniously together.

I admit that a legislative body may, by different laws, impose upon the same person, for the same offence, different and cumulative punishments; but then it is the will of the same body to do so, and the second, equally with the first law, is the will of that body. There is,

therefore, and can be, no opposition of wills. But the case is altogether different, where the laws flow from the wills of distinct, coordinate bodies.

This course of reasoning is intended as an answer to what I consider a novel and unconstitutional doctrine, that in cases where the state governments have a concurrent power of legislation with the national government, they may legislate upon any subject on which congress has acted, provided the two laws are not in terms, or in their operation, contradictory and repugnant to each other.

Upon the subject of the militia, congress has exercised the powers conferred on that body by the constitution, as fully as was thought right, and has thus excluded the power of legislation by the States on these subjects, except so far as it has been permitted by congress; although it should be conceded, that important provisions have been omitted, or that others which have been made might have been more extended, or more wisely devised.

There still remains another question to be considered, which more immediately involves the merits of this cause. Admit that the legislature of Pennsylvania could not constitutionally legislate in respect to delinquent militia-men, and to prescribe the punishment to which they should be subject, had the state court-martial jurisdiction over the subject, so as to enforce the laws of congress against these delinquents?

This, it will be seen, is a different question from that which has been just examined. That respects the power of a state legislature to legislate upon a subject on which congress has declared its will. This concerns the jurisdiction of a state military tribunal to adjudicate in a case which depends on a law of congress, and to enforce it.

It has been already shown that congress has prescribed the punishment to be inflicted on a militia-man detached and called forth, but who has refused to march; and has also provided that courts-martial for the trial of such delinquents, to be composed of militia officers only, shall be held and conducted in the manner pointed out by the rules and articles of war.

That congress might have vested the exclusive jurisdiction in courts-martial to be held and conducted as the laws of the United States have prescribed, will, I presume, hardly be questioned. The offence to be punished grows out of the constitution and laws of the United States, and is, therefore, clearly a case which might have been withdrawn from the concurrent jurisdiction of the state tribunals. But an exclusive jurisdiction is not given to courts-martial, deriving their authority under the national government, by express words. The question then (and I admit the difficulty of it) occurs, is this a case in which the state courts-martial could exercise jurisdiction?

Speaking upon the subject of the federal judiciary, the Federalist distinctly asserts the doctrine that the United States, in the course of legislation upon the objects intrusted to their direction, may commit the decision of causes arising upon a particular regulation to the federal courts solely, if it should be deemed expedient; yet that, in every case in which the state tribunals should not be expressly excluded by the acts of the national legislature, they would, of course, take cogni-

zance of the causes to which those acts might give birth. Letters of Publius, or the Federalist, No. 82.

I can discover, I confess, nothing unreasonable in this doctrine; nor can I perceive any inconvenience which can grow out of it, so long as the power of congress to withdraw the whole, or any part of those cases from the jurisdiction of the state courts, is, as I think it must be, admitted.

The practice of the general government seems strongly to confirm this doctrine; for at the first session of congress which commenced after the adoption of the constitution, the judicial system was formed; and the exclusive and concurrent jurisdiction conferred upon the courts created by that law, were clearly distinguished and marked; showing that, in the opinion of that body, it was not sufficient to vest an exclusive jurisdiction, where it was deemed proper, merely by a grant of jurisdiction generally. In particular, this law grants exclusive jurisdiction to the circuit courts of all crimes and offences cognizable under the authority of the United States, except where the laws of the United States should otherwise provide; and this will account for the proviso in the act of the 24th of February, 1807, ch. 75, (2 Stats. at Large, 423,) concerning the forgery of the notes of the Bank of the United States, "that nothing in that act contained should be construed to deprive the courts of the individual States of jurisdiction under the laws of the several States over offences made punishable by that act." A similar proviso is to be found in the act of the 21st of April, 1806, ch. 49, (2 Stats. at Large, 404,) concerning the counterfeiters of the current coin of the United States. It is clear that, in the opinion of congress, this saving was necessary in order to authorize the exercise of concurrent jurisdiction by the state courts over those offences; and there can be very little doubt but that this opinion was well founded. The Judiciary Act had vested in the federal courts exclusive jurisdiction of all offences cognizable under the authority of the United States, unless where the laws of the United States should otherwise direct. The States could not, therefore, exercise a concurrent jurisdiction in those cases, without coming into direct collision with the laws of Congress. But by these savings, congress did provide that the jurisdiction of the federal courts in the specified cases should not be exclusive; and the concurrent jurisdiction of the state courts was instantly restored, so far as, under state authority, it could be exercised by them.

There are many other acts of congress which permit jurisdiction over the offences therein described, to be exercised by state magistrates and courts; not, I presume, because such permission was considered to be necessary under the constitution, in order to vest a concurrent jurisdiction in those tribunals; but because, without it, the jurisdiction was exclusively vested in the national courts by the Judiciary Act, and consequently could not be otherwise exercised by the state courts. For I hold it to be perfectly clear, that congress cannot confer jurisdiction upon any courts, but such as exist under the constitution and laws of the United States, although the state courts may exercise jurisdiction on cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the federal courts.

What, then, is the real object of the law of Pennsylvania which we are considering? I answer, to confer authority upon a state court-martial to enforce the laws of the United States against delinquent militia-men, who had disobeyed the call of the President to enter into the service of the United States; for, except the provisions for vesting this jurisdiction in such a court, this act is, in substance a reënactment of the acts of congress, as to the description of the offence, the nature and extent of the punishment, and the collection and appropriation of the fines imposed.

Why might not this court-martial exercise the authority thus vested in it by this law? As to crimes and offences against the United States, the law of congress had vested the cognizance of them exclusively in the federal courts. The state courts, therefore, could exercise no jurisdiction whatever over such offences, unless where, in particular cases, other laws of the United States had otherwise provided; and wherever such provision was made, the claim of exclusive jurisdiction to the particular cases was withdrawn by the United States, and the concurrent jurisdiction of the state courts was eo instanti restored, not by way of grant from the national government, but by the removal of a disability before imposed upon the state tribunals.

But military offences are not included in the act of congress, conferring jurisdiction upon the circuit and district courts; no person has ever contended that such offences are cognizable before the common law courts. The militia laws have, therefore, provided, that the offence of disobedience to the President's call upon the militia, shall be cognizable by a court-martial of the United States; but an exclusive cognizance is not conferred upon that court, as it had been upon the common law courts as to other offences, by the Judiciary Act. It follows, then, as I conceive, that jurisdiction over this offence remains to be concurrently exercised by the national and state courts-martial, since it is authorized by the laws of the State, and not prohibited by those of the United States. Where is the repugnance of the one law to the other? The jurisdiction was clearly concurrent over militia-men, not engaged in the service of the United States; and the acts of congress have not disturbed this state of things, by asserting an exclusive jurisdiction. They certainly have not done so in terms; and I do not think that it can be made out by any fair construction of them. The act of 1795 merely declares that this offence shall be tried by a court-martial. This was clearly not exclusive; but, on the contrary, it would seem to import that such court might be held under national or state authority.

The act of 1814 does not render the jurisdiction necessarily exclusive. It provides that courts-martial for the trial of militia, drafted and called forth, shall, when necessary, be appointed, held, and conducted in the manner prescribed by the rules of war.

If the mere assignment of jurisdiction to a particular court does not necessarily render it exclusive, as I have already endeavored to prove, then it would follow that this law can have no such effect; unless, indeed, there is a difference in this respect between the same language, when applied to military and to civil courts; and if there be a differ-

ence, I have not been able to perceive it. But the law uses the expression "when necessary." How is this to be understood? It may mean, I acknowledge, whenever there are delinquents to try; but, surely, if it import no more than this, it was very unnecessarily used, since it would have been sufficient to say that courts-martial for the trial of militia called into service, should be formed and conducted in the manner prescribed by the law. The act of 1795, had declared who were liable to be tried, but had not said with precision before what court the trial should be had. This act describes the court; and the two laws being construed together, would seem to mean that every such delinquent as is described in the act of 1795, should pay a certain fine, to be determined and adjudged by a court-martial, to be composed of militia officers, to be appointed and conducted in the manner prescribed by the articles of war. These words, when necessary, have no definite meaning, if they are confined to the existence of cases for trial before the court. But if they be construed (as I think they ought to be) to apply to trials rendered necessary by the omission of the States to provide for state courts-martial to exercise a jurisdiction in the case, or of such courts to take cognizance of them, when so authorized, they have an important and a useful meaning. If the state court-martial proceeds to take cognizance of the cases, it may not appear necessary to the proper officer in the service of the United States to summon a court to try the same cases; if they do not, or for want of authority cannot try them, then it may be deemed necessary to convene a court-martial under the articles of war, to take, and to exercise the jurisdiction.

There are two objections which were made by the plaintiff's counsel to the exercise of jurisdiction in this case, by the state court-martial, which remain to be noticed.

1. It was contended that if the exercise of this jurisdiction be admitted, that the sentence of the court would either oust the jurisdiction of the United States' court-martial, or might subject the accused to be twice tried for the same offence. To this I answer, that, if the jurisdiction of the two courts be concurrent, the sentence of either court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other, as much so as the judgment of a state court, in a civil case of concurrent jurisdiction, may be pleaded in bar of an action for the same cause, instituted in a circuit court of the United States.

Another objection is, that if the state court-martial had authority to try these men, the governor of that State, in case of conviction, might have pardoned them. I am by no means satisfied that he could have done so; but if he could, this would only furnish a reason why congress should vest the jurisdiction in these cases, exclusively in a court-martial acting under the authority of the United States.

Upon the whole, I am of opinion, after the most laborious examination of this delicate question, that the state court-martial had a concurrent jurisdiction with the tribunal pointed out by the acts of congress to try a militia-man who had disobeyed the call of the President, and to enforce the laws of congress against such delinquent; and that this authority will remain to be so exercised until it shall please con-

gress to vest it exclusively elsewhere, or until the State of Pennsylvania shall withdraw from their court-martial the authority to take such jurisdiction. At all events, this is not one of those clear cases of repugnance to the constitution of the United States, where I should feel myself at liberty to declare the law to be unconstitutional; the sentence of the court *coram non judice*; and the judgment of the supreme court of Pennsylvania erroneous on these grounds.

Two of the judges are of opinion that the law in question is unconstitutional, and that the judgment below ought to be reversed.

The other judges are of opinion that the judgment ought to be affirmed; but they do not concur, in all respects, in the reasons which influence my opinion. * * *

Judgment affirmed.

2. DOBBINS v. COMMISSIONERS OF ERIE COUNTY.

(Supreme Court of the United States, 1842. 16 Pet. 435, 10 L. Ed. 1022.)

WAYNE, J., delivered the opinion of the court.

This cause has been brought to this court by a writ of error to the supreme court of Pennsylvania.

That court reversed the judgment of the court of common pleas of Erie county, which it had given in favor of the plaintiff, (now in error,) upon an agreed statement of facts, in the nature of a special verdict.

"It was agreed and admitted, that the plaintiff has his residence and domicile at Erie, Erie county, Pennsylvania, and votes in said place; that he has been for the last eight years an officer of the United States, a captain in the United States revenue-cutter service, and ever since his appointment has been in service, in command of the revenue cutter Erie, on the Erie station. That he has been rated and assessed with county taxes for the last three years, 1835, 1836, 1837, as such officer of the United States, for his office, as such, valued at \$500; which taxes paid by the plaintiff, amount to the sum of \$10.75. The question submitted to the court is, whether the plaintiff is liable to be rated and assessed for his office under the United States, for county rates and levies? If he is, then judgment shall be entered for the defendants; if not, then judgment shall be entered for the plaintiff, for the sum of \$10.75."

This is the only question submitted upon the record. We think it sufficiently appears to give the court jurisdiction, that the supreme court in reversing the judgment of the court of common pleas, and in giving judgment against the plaintiffs, decided in favor of the validity of a law of Pennsylvania subjecting the plaintiff to be rated and assessed for his office under the United States, for county rates and levies; the validity of which law was in question, on the ground of its being repugnant to the constitution and laws of the United States.

It was urged in argument by the counsel for the defendants in error, if the court has jurisdiction of the cause, that the judgment of the supreme court should be affirmed, because the plaintiff when assessed did not apply to the commissioners for relief, as the statute provides. And that, having paid the tax to an officer who had a color of right to receive it, it cannot be recovered back by the plaintiff.

Neither of these questions can be considered by this court. They are not in the special verdict upon which the judgment was rendered. By referring to the case, as reported in 7 Watts, 513, it will be seen that the supreme court put the case exclusively upon the power and right of the commissioners to enforce the tax upon the plaintiff, for his office under the United States.

The assessment was made by the commissioners of Erie county under the act of Pennsylvania of the 15th April, 1834. It is believed to be the only instance of a tax being rated in that State upon the office of an officer of the United States. It has, however, received the sanction of the supreme court. If it can be lawfully done, it cannot be doubted that similar assessments will be made under that law, upon all other officers of the United States, in Pennsylvania. The language of the court is, "the case is put on the power and right to impose the tax. In other words, is this a legitimate subject of taxation? Perhaps this may, in some measure, depend on, whether, within the true meaning of the acts, it is the office itself, or the emoluments of the office which are made the subjects of taxation." In the preceding extract, we gave the language of the court. The law is, that an account shall be taken of "all offices and posts of profit." The next section makes it the duty of the assessors, "to rate all offices and posts of profit, professions, trades, and occupations, at their discretion, having a due regard to the profits arising therefrom."

The emoluments of the office, then, are taxable, and not the office. But, whether it be one or the other, we cannot perceive how a tax upon either conduces to comprehend within the terms of the act, the office or the compensation of an officer of the United States. It will not do to say, as it was said in argument, that though the language of the act may import that offices and posts of profit were taxable, that it was the citizen who holds the office whom the law intended to tax, and that it was a burden he was bound to bear in return for the privileges enjoyed, and the protection received from government; and, then, that the liability to pay the tax was a personal charge, because the person upon whom it was assessed was a taxable person.

The first answer to be given to these suggestions, is, that the tax is to be levied upon a valuation of the income of the office. But, besides the obligation upon persons to pay taxes, is mistaken, and the sense in which a tax is a personal charge, is misunderstood. The foundation of the obligation to pay taxes, is not the privileges enjoyed or the protection given to a citizen by government, though the payment of taxes gives a right to protection. Both are enjoyed, as well by those members of a State who do not, because they are not able to pay taxes, as by those who are able, and do pay them. Married women and children have privileges and protection, but they are not assessed, unless they have goods or property separate from the heads of families. The necessity of money for the support of States in times of peace or war, fixes the obligation upon their citizens to pay such taxes as may be imposed by lawful authority. And the only sense in which a tax is a personal charge, is, that it is assessed upon personal estate, and the profits of labor and industry. It is called a personal charge, to distinguish such a tax from the tax upon lands and tenements, which

are enforced without any regard to the persons who are the owners. Taxes are never assessed, unless it be a capitation tax, upon persons as persons, but upon them on account of their goods, and the profits made upon professions, trades, and occupations. They are so imposed because public revenue can only be supplied by assessments upon the goods of individuals—"comprehending under the word 'goods,' all the estate and effects which every one hath, of whatsoever sort they be. Taxes regard the persons of men only because of their goods." The goods then are taxed and not the person. But those who are to pay the tax are taxable persons, because they are under an obligation to contribute from their means to the necessities of the State. The obligation, however, only becomes a charge upon the person in consequence of the power in the State to enforce the payment of taxes by coercion. This power extends to the sequestration of the goods, and the imprisonment of the delinquent. A tax, according to the object upon which it is laid, may be a personal charge; but that is a very different thing from its becoming a charge upon the person, in consequence of the coercion which may be provided by law to enforce the payment.

We have been more particular in noticing this argument, because it enabled us to put the point upon which it was intended to bear upon right principles. Besides, as it was drawn from the statutes of Pennsylvania, it implied the supposition that her legislature, in these enactments upon taxation, had disregarded those principles. But this is not so. If the occasion was a proper one for this court to do it, we might easily show that the act throughout, was framed upon an enlightened recognition by the legislators of that State, of all the principles upon which taxes are imposed. The only difficulty in the act has arisen from the terms directing assessments to be made upon all offices and posts of profit, without restricting the assessments to offices and posts of profit held under the sovereignty of that State; and not excluding them from being made upon offices and posts of profit of another sovereignty—the United States.

The case being now cleared of other objections, except such as relate to the unconstitutionality of the tax, we will consider the real and only question in it; that is, "whether the plaintiff is liable to be rated and assessed for his office under the United States, for county rates and levies?"

It is not necessary for the decision of this question, that the power of taxation in the States, and in the United States, under the constitution of the latter, should be minutely discussed.

Taxation is a sacred right, essential to the existence of government; an incident of sovereignty. The right of legislation is coextensive with the incident, to attach it upon all persons and property within the jurisdiction of a State. But in our system there are limitations upon that right. There is a concurrent right of legislation in the States and the United States, except as both are restrained by the constitution of the United States. Both are restrained upon this subject, by express prohibitions in the constitution; and the States, by such as are necessarily implied when the exercise of the right by a State conflicts with the perfect execution of another sovereign power, delegated to the United States. That occurs when taxation by a State acts upon the instru-

ments, emoluments, and persons which the United States may use and employ as necessary and proper means to execute their sovereign powers. The government of the United States is supreme within its sphere of action. The means necessary and proper to carry into effect the powers in the constitution are in congress. Taxation is a sovereign power in a State; but the collection of revenue by imposts upon imported goods, and the regulation of commerce, are also sovereign powers in the United States. Let us apply then the principles just stated, and the powers mentioned to the case in judgment, and see what will be the result.

Congress has power to lay and collect taxes, duties, imposts, &c., and to regulate commerce with foreign nations and among the several States, and with the Indian tribes. Neither can be done without legislation. A complicate machinery of forms, instruments, and persons must be established; revenue districts were to be designated; collectors, naval officers, surveyors, inspectors, appraisers, weighers, measurers, and gaugers must be employed; "the better to secure the collection of duties on goods and on the tonnage of vessels," revenue cutters, and officers to command them, are necessary. The latter are declared to be officers of the customs, and they have large powers and authority. All of this is legislation by congress to execute sovereign powers. They are the means necessary to an allowed end; the end, the great objects which the constitution was intended to secure to the States in their character of a nation. Is the officer, as such, less a means to carry into effect these great objects than the vessel which he commands, the instruments which are used to navigate her, or than the guns put on board to enforce obedience to the law. These inanimate objects, it is admitted, cannot be taxed by a State, because they are means. Is not the officer more so, who gives use and efficacy to the whole? Is not compensation the means by which his services are procured and retained? It is true it becomes his when he has earned it. If it can be taxed by a State as compensation, will not congress have to graduate its amount, with reference to its reduction by the tax? Could congress use an uncontrolled discretion in fixing the amount of compensation, as it would do without the interference of such a tax? The execution of a national power by way of compensation to officers, can in no way be subordinate to the action of the state legislatures upon the same subject. It would destroy also all uniformity of compensation for the same service, as the taxes by the States would be different. To allow such a right of taxation to be in the States, would also in effect be to give the States a revenue out of the revenue of the United States, to which they are not constitutionally entitled, either directly or indirectly; neither by their own action, nor by that of congress. The revenue of the United States is intended by the constitution, to pay the debts, and provide for the common defence and general welfare of the United States; to be expended, in particulars, in carrying into effect the laws made to execute all the express powers, "and all other powers vested by the constitution in the government of the United States." But the unconstitutionality of such taxation by a State as that now before us may be safely put—though it is not the only ground—upon its interference with the constitutional means which

have been legislated by the government of the United States to carry into effect its powers to lay and collect taxes, duties, imposts, &c., and to regulate commerce. In our view, it presents a case of as strong interference as was presented by the tax imposed by Maryland, in the case of *M'Culloch*, 4 Wheat. 316, 4 L. Ed. 579, and the tax by the City Council of Charleston, in *Weston's Case*, 2 Pet. 449, 7 L. Ed. 481, in both of which it was decided by this court, that the state governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers.

But we have said that the ground upon which we have just put the unconstitutionality of the tax in the case before us, is not the sole ground upon which our conclusion can be maintained. We will now state another ground; and we do so because it is applicable to exempt the salaries of all officers of the United States from taxation by the States.

The powers of the national government can only be executed by officers whose services must be compensated by congress. The allowance is in its discretion. The presumption is that the compensation given by law is no more than the services are worth, and only such an amount as will secure from the officer the diligent performance of his duties. "The officers execute their offices for the public good. This implies their right of reaping from thence the recompense the services they may render may deserve;" without that recompense being in any way lessened, except by the sovereign power from whom the officer derives his appointment, or by another sovereign power to whom the first has delegated the right of taxation over all the objects of taxation, in common with itself, for the benefit of both. And no diminution in the recompense of an officer is just and lawful, unless it be prospective, or by way of taxation by the sovereignty who has a power to impose it; and which is intended to bear equally upon all according to their estate.

The compensation of an officer of the United States is fixed by a law made by congress. It is in its exclusive discretion to determine what shall be given. It exercises the discretion and fixes the amount, and confers upon the officer the right to receive it when it has been earned. Does not a tax, then, by a State upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entirety? It certainly has such an effect; and any law of a State imposing such a tax cannot be constitutional, because it conflicts with a law of congress made in pursuance of the constitution, and which makes it the supreme law of the land.

We are, therefore, of opinion, that the judgment of the supreme court of Pennsylvania, reversing the judgment of the court of common pleas of Erie county, declaring the plaintiff was not liable to be rated and assessed for county rates, and levies for his office under the United States, is erroneous; in this—that the said supreme court adjudged that the act of Pennsylvania embracing all offices and posts of profit, comprehending offices of the United States, was not repugnant to the constitution and laws of the United States; whereas this court is of opinion that such repugnancy does exist. We are, therefore, of opinion that the said judgment ought to be reversed and an-

nulled; and the cause remanded to the said supreme court of Pennsylvania, in and for the western district, with directions to affirm the judgment of the court of common pleas of Erie county.

3. COMMONWEALTH v. BLODGETT.

(Supreme Judicial Court of Massachusetts, 1846. 12 Metc. 56.)

SHAW, C. J. The great Rhode Island controversy, threatening, and at one time involving, the dangers and troubles of insurrection and civil war, out of which this case grew, having happily passed away, the case itself has lost much of the interest with which it was once invested. It presents questions of unusual magnitude and importance, lying beyond the scope of those investigations with which the administration of the criminal law is usually conversant; but happily they are questions of rare occurrence. We shall allude to the facts, very briefly, to make the points intelligible.

The indictment was originally returned against three persons, of whom one was acquitted and the others convicted. It was founded on the provisions of the Rev. St. c. 125, § 20, which prohibit the unlawful and forcible seizure, imprisonment, or abduction of persons.

The proof, on the part of the prosecution, tended to show, that the defendants, with about twenty other persons, armed with military weapons, about the hour of one o'clock at night, broke and entered the house of Jeremiah Crooks, who kept a tavern in Bellingham, in this county, and there seized and bound the four persons named in the indictment, to wit, William T. Olney, Oliver Ballou, Arnold Whipple and Timothy Walker, kept them there some hours in custody, and then carried them bound to Rhode Island. Some circumstances of aggravation, in the conduct of the defendants, are stated in the bill of exceptions, which seem not material to any principle involved in the case.

It was argued in behalf of the defendants, that this case, if proved, was not within the aforesaid statute, which was rather designed to prevent and punish kidnapping and unlawfully seizing negroes or colored persons, for the purpose of making them slaves. The terms of the statute are as follows: "Every person who, without lawful authority, shall forcibly or secretly confine or imprison any other person, within this State, against his will, or shall forcibly seize and confine, or shall inveigle or kidnap any other person, with intent to cause such person to be secretly confined or imprisoned in this State, against his will, or to cause such person to be sent out of this State, against his will, or to be sold as a slave," &c., "shall be punished," &c.

It may be very probable, that the legislature had in mind the offence of kidnapping, in connexion with slavery, as the more immediate inducement to the passing of the act; but the terms of the act are broad enough to include the case of unlawful confinement of another, with the intent to cause him to be carried out of this State against his will. And it is not unusual in legislation, where a particular apprehended wrong or grievance is the immediate occasion for the passing of an act, to extend it to other wrongs of the like kind, and make a general in-

stead of a specific provision. But further; this is no new provision in the revised statutes. It is taken substantially from the pre-existing St. of 1784, c. 72, § 10, which is the old habeas corpus act. The court are of the opinion, that the case is within the statute in question, and that the first exception cannot be sustained.

The other exceptions turn upon the matter of justification or excuse arising out the facts narrated in the very voluminous bill of exceptions, setting forth almost the entire history of the insurrection and civil war in Rhode Island, occasioned by an attempt to overthrow the existing government of the State, and to replace it by another, claimed to be the people's constitution. Perhaps many of the facts, set forth in the bill of exceptions, might not, in strict law, be susceptible of judicial proof; but being of general notoriety, we presume they were not much contested, and were introduced in order to show the effect and application of the instructions given or withheld by the court, in matter of law. It is these only which we are called upon to revise. They are extremely important to the peace of the country and the security and stability of all the state governments. The court have derived great benefit from the full and able arguments of counsel on the subject, and have given the subject the attention which its importance demanded.

It will not be necessary to recapitulate or even make a summary of the facts. They are fully detailed in the bill of exceptions. Those that concern these defendants more particularly are as follows: That an organized attempt was made to overthrow the existing government of the State, by force of arms; that the legislature had, by an act in due form, declared the State to be under martial law; that William G. McNeill, Esq., had been appointed Major-General and commander in chief of the forces raised by the State to oppose the insurrection; that the insurgents, organized and in military array, were stationed, in some force, at Chepachet and Woonsocket, villages bordering on the line of Massachusetts. It further appears, that on the evening of the 27th of June, the camp of the insurgents, at Chepachet, and other persons there assembled, were advised to disperse; that they did not afterwards appear in any considerable force, but that fears were entertained, by the people of Rhode Island, that they would again assemble within the limits of Connecticut or Massachusetts, and again annoy the people of Rhode Island; that on the 29th, an order was published, stating that there was no longer a necessity for the continuance of the troops in general in the field, and that they might return to their several homes; that various orders were given, with a view to arresting the fugitives, whether within the limits of the State or not, to the extent of fifty miles from Chepachet; that by order of Major Martin, the defendant Blodgett, who was in the military service of the State, with the other defendant, Hendrick, as a guide, with about twenty men, proceeded, as before stated, to Crooks's tavern in Bellingham, and there found and arrested the four persons named, who had been in arms against the State, but were not then in arms, or engaged with others in any military operation; that the neighborhood was peaceful and quiet, the house was fastened, and the inmates asleep.

Upon these facts, stated more at large in the bill of exceptions, the counsel for the defendants prayed the court to instruct the jury, that

if they found that the said Olney and others were citizens of Rhode Island, and had been in arms as insurgents, as aforesaid, against said State, and, upon the approach of the troops of said State, had fresh fled from the insurgent camp to Massachusetts, for refuge from the authorities and troops of Rhode Island merely, they were not in the peace of Massachusetts, &c. The court declined so to instruct, but did instruct the jury, that if Rhode Island was in a state of civil war, and said Olney and others stood in the relation contemplated, yet, upon crossing the lines of Massachusetts, they were in the peace of the Commonwealth, and within the protection of her laws, exempt from the pursuit of the authorities and troops of Rhode Island; and that the defendants were criminally responsible for capturing the said Olney and others, within the boundaries of Massachusetts.

The court are of the opinion that this instruction was correct. It has been argued that the State of Rhode Island, and the other States, under the circumstances in which she was placed, stood in the relations of foreign sovereign States, one of which was at war, and the other neutral; and we were referred to authorities from the laws of nations, to ascertain their respective rights and duties. It would be dangerous, perhaps impracticable, to adopt this reasoning to its full extent, and carry it out into all its consequences. The relations of the States of the Union to each other are very peculiar, and give rise to questions of great delicacy and difficulty. If the States, and the citizens of States, are to be placed in the relations of belligerents and neutrals, and bound by the laws of nations, then they must have the power of regulating their duties and obligations by negotiations and treaties, and thus be enabled more effectually to provide for the performance of their relative duties, and the security of their respective rights. But the States are expressly prohibited from entering into any treaty, alliance, or confederation, or, without the consent of congress, to enter into any agreement or compact with another State, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. They are, therefore, in the condition of States sovereign to some purposes, but who have by compact renounced and relinquished their sovereign powers, in regard to war and peace, and, of course, to the regulation and control of the incidents to war and peace, except the power of taking warlike measures, strictly and purely defensive, in case of an exigency, which will admit of no delay. In all other respects, the power of making war and peace, of treaties and alliances, is vested absolutely and exclusively in the general government, with their incidents. But as a compensation for this surrender, the general government of the United States is bound to protect each State against invasion, and against domestic violence. The constitution of the United States is to be taken as a whole; and whilst it restrains the States from making war and peace, and exercising powers incidental thereto, it assumes that the general government will do its duty and effectually secure to each State that immunity from all violence, foreign and domestic, which was the obvious consideration for the surrender of these great powers. It is useless to speculate upon the contingency, as to what would be the rights of the States in case the general government should fail to afford that protection to States which the constitution

guarantees to them. Such a state of things is not to be supposed. It would be one of revolution and of anarchy, in which a regard to self-defence and public safety would constitute an exigency that would warrant such measures as the necessity of the case might require, under the maxim, "*Salus populi suprema est lex.*" The necessity, which would create such an exigency, must limit and direct the means of meeting it.

But supposing, for the purpose of the argument, that the relations of the States to each other were those of sovereign States, in one of which an insurrection against the government existed; we think the instructions given in this case, upon the facts stated in the bill of exceptions, were correct. The exclusive right of every sovereign State to its own territory, and to the regulation and government of it, is absolute and inviolable, and extends to all persons within it. Every person entering the territory owes allegiance to the government, temporary indeed, but absolute. Whilst he continues within it, he is bound, like any other subject, by the laws of the State, owes it obedience, and is liable to the operation of its criminal laws; and as a correlative right, he is regarded as subject, for the purpose of protection and immunity from arrest, and all forcible invasion of his liberty or property, by any other State, except so far as the exercise of such right by foreign authority is stipulated for, by treaty amongst sovereign States, or, amongst the States of this Union, by the constitution of the United States, and the laws and treaties made under it. According to these principles, which seem to us plain and well settled, Olney and the other persons, found at Crooks's tavern in Bellingham, owed allegiance to Massachusetts, whilst they remained within the limits of the State; they were subject to its laws, would have been responsible for any violation of them, and, for the time being, were in the peace of the Commonwealth.

We do not mean to be understood as holding that soldiers and subordinate military officers, who are ordered by their sovereign to enter the territory of another State to pursue an enemy, and for any other purpose, may not rightfully claim impunity from the animadversion of the criminal laws of the country invaded. Such an invasion, however, must be deemed to be made *flagrante bello*, whether war have been declared or not; because it is in itself an act of war. But this could not be justified by an order of the subordinate military authorities of a State, in the exercise of their ordinary functions in the defence of a State. Nothing but the sovereign power of the State, by a previous order, directing such invasion, or by a subsequent ratification, when done in its name, will warrant such invasion, and excuse the subordinates engaged in it; because it emanates from the sovereign authority having the power to make war. The wrong done by such an invasion then becomes a question of negotiation between sovereigns, and the subordinate agents are entitled to immunity.

The court, in saying that in their judgment the instruction to the jury was correct, in charging them that Olney, Ballou, Whipple, and Walker, upon crossing the lines of Massachusetts, were in the peace of the Commonwealth, and within the protection of her laws, against the pursuit of the authorities and troops of Rhode Island, and that

the defendants were criminally liable for capturing the said Olney and others, have done so on the facts stated, and in connexion with the qualifying instruction given at the same time. It was this: That if there existed a necessity, for the defense or protection of the lives and property of the citizens of Rhode Island, that the defendants should do the acts complained of in the indictment, or if there was probable cause to suppose, at the time, the existence of such a necessity, and the jury found such necessity or probable cause, they were to acquit them. And much evidence was given on both sides upon this question of fact. This instruction gave the defendants the full benefit of any excuse, arising from the use of force in the necessary defence of the State and its citizens, in whose service they were engaged; leaving a great latitude as to the means necessary to such defence. It is not requisite, we think, in the present case, to attempt drawing any exact line of distinction as to the measures which such necessary defence would warrant, nor, perhaps, would it be practicable; because it must depend much on the circumstances of each case. In the present case, it appears that the arrest of Olney and others was made at midnight, in a dwelling-house and common tavern, nearly three miles from the state line, the men not being in arms or in military array, or in such numbers as to be immediately formidable; and it is difficult to perceive how such act could be considered as done in the necessary defence of the territory of Rhode Island. The men had been in arms, and probably had rendered themselves amenable to the laws of Rhode Island; and it might be a prudent precaution, on the part of that State, to discover, pursue and arrest them, as suspicious persons, of which they had no right to complain; and if it could have been done without violating the laws, the peace, or the rights of this Commonwealth, it would have been quite excusable. But the question was rightly submitted to the jury, as one of strictly necessary defence.

4. In re WEHLITZ.

(Supreme Court of Wisconsin, 1863. 16 Wis. 443, 84 Am. Dec. 700.)

Certiorari to a Court Commissioner for Milwaukee County.

Carl Wehlitz, the petitioner, was born in the kingdom of Prussia, and came to the United States in 1854, after which, and before his enrollment on the militia list of the 9th ward of the city of Milwaukee, of which he was a resident, he declared his intention to become a citizen of the United States, in conformity with the laws of the United States, but had not been admitted to citizenship or taken the final oath required by law. On the 19th day of November, 1862, he was drafted from the 9th ward of the city of Milwaukee, into the military service of the United States, under the several acts of congress on that subject, and the orders of the war department, and of the President, and was detained for that reason to do military duty, as one of the drafted militia, in the 34th Wisconsin regiment of infantry, by the commandant thereof, Col. Fritz Anneke. He applied for and obtained from James Mitchell, Esq., court commissioner for Milwaukee county, a writ of habeas corpus, directed to Col. Fritz Anneke. The

writ was properly returned, and upon a hearing, it appeared that the petitioner, after he had declared his intention of becoming a citizen of the United States, had on several occasions exercised the right of suffrage under the constitution and laws of this state. The commissioner, after the hearing before him, when the foregoing facts were made to appear, decided that the petitioner was not liable to be drafted into the military service of the United States, and made an order discharging him from the custody and restraint of which he had complained. The case came before this court for review, on a writ of certiorari.

By the Court, PAINE, J. This matter was decided by a court commissioner of Milwaukee county, who made an order discharging the petitioner, and it has been brought here by a writ of certiorari.

We have already decided in the application of Frederick Griner et al., 16 Wis. 423, for a writ of habeas corpus, that the act of congress of July 17, 1862, authorizing the President to make the necessary rules and regulations for drafting the militia in cases where the laws of the states had not made a sufficient provision for that purpose, was valid. The only question left then to be determined in this case, is whether a resident of this state who was a native of a foreign country, but who had declared his intention to become a citizen of the United States, and taken out his first papers in accordance with the law of congress, and had exercised the right of voting under the constitution and laws of this state, all of which was true of the petitioner, was liable to be drafted?

The decision of this question depends upon the meaning of the several acts of congress, and the laws of this state, in regard to the militia. For it has been the policy of the general government in all of its legislation hitherto upon this subject, to trust so much to the action of the states, that it becomes necessary to consider the entire system of legislation both state and federal, to have a correct understanding of the laws of either.

The act of congress providing for the organization of the militia, approved May 8th, 1792, designated as the persons to be enrolled "every free, able-bodied, white male citizen of the respective states, resident therein, &c." Prior to 1858, the law of this state provided that "every free, able-bodied, white male person who has resided within this state one month, and is between the ages of eighteen and forty-five, shall be enrolled in the militia, &c." Sec. 5, chap. 31, R. S. 1858. But section one of chapter 87 of the general laws of 1858, which is found as a part of the chapter just referred to, designated as those who should be liable to military duty, "all able-bodied, white, male citizens, &c."

The act of congress of July 17, 1862, before referred to, provided that in all cases, the enrollment should "include all able-bodied male citizens, &c." It thus appears, that in the laws both of this state and the United States, now in force, the word "citizen" is used as descriptive of the persons liable to enrollment in the militia. The decision must therefore depend upon the meaning of that word.

The commissioner decided that it meant only those who were full citizens of the United States. But before that conclusion can be adopt-

ed, it will be necessary to inquire whether the word has any other well recognized meaning, not necessarily including the full rights of citizenship of the United States, and if so, then to determine in which sense it was used in these laws. That it has such another meaning must be admitted. Under our complex system of government, there may be a citizen of a state, who is not a citizen of the United States in the full sense of the term. This result would seem to follow unavoidably from the nature of the two systems of government. Each state being sovereign, except as to matters referred to the general government, may, as an undoubted result of that sovereignty, confer such rights of citizenship as it pleases, so far as it relates to itself only. But the power having been delegated to congress to pass uniform naturalization laws, and it being exclusive in its character, no state can confer such rights of citizenship upon an alien who has not complied with the laws of congress, so as to make him a citizen of the United States, and entitled to the rights and privileges guaranteed to citizens by the federal constitution.

This doctrine has been recently very clearly stated by the supreme court of the United States, in the Dred Scott case, in which the question was, whether a negro could be a citizen of a state, within the meaning of the constitution of the United States, so as to be entitled to sue in the federal courts, that court said: "In discussing this question, we must not confound the rights of citizenship, which a state may confer within its own limits, and the rights of citizenship as a member of the Union. It does not, by any means follow, because he has all the rights and privileges of a citizen of a state, that he must be a citizen of the United States. He may have all the rights and privileges of the citizen of a state, and yet not be entitled to the rights and privileges of a citizen in any other state. For previous to the adoption of the constitution of the United States, every state had the undoubted right to confer on whomsoever it pleased the character of a citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the state, and gave him no rights or privileges in other states beyond those secured to him by the laws of nations and the comity of states. Nor have the several states surrendered the power of conferring these rights and privileges by adopting the constitution of the United States. Each state may still confer them upon an alien or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen, in the sense in which that word is used in the constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other states. The rights which he would acquire would be restricted to the state which gave them. The constitution has conferred on congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so; consequently, no state since the adoption of the constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a state under the federal government, although so far as the state alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all

the rights and immunities which the constitution and laws of the state attached to that character." 19 How. 405, 15 L. Ed. 691.

The power of a state to confer a right of citizenship, so far as it alone is concerned, and which does not amount to a full citizenship of the United States could not be more plainly stated, than it is in the above extract. It is true, however, that further on in the opinion, 19 How. on page 422, 15 L. Ed. 691, the court says: "So, too, a person may be entitled to vote by the law of a state who is not a citizen even of the state itself; and in some of the states of the Union, foreigners not naturalized, are allowed to vote; and the state may give the right to free negroes and mulattoes, but that does not make them citizens of the state, and still less of the United States." Still, what is here said does not detract at all from the broad doctrine stated in the former extract. It means no more than this, that the state may confer the right to vote, without necessarily making those on whom it is conferred citizens of the state even. This may possibly be true; but the power of the state being conceded to confer the rights of citizenship within itself upon whomsoever it pleases, the question whether it has done so or not is a mere question of intention, to be determined by a proper construction of its own constitution and laws, and one also which the supreme tribunal of each state is to determine for itself. This being so, although it may be possible for the state to confer the right of voting on certain persons without making them citizens, yet I should think it would require very strong evidence of a contrary intention, to overcome the inference of an intention to create a citizenship when the right of suffrage is conferred. The remarks of Justice Curtis, in his dissenting opinion in the Dred Scott case (19 How. 581, 15 L. Ed. 691), states the true effect which ought to be given to the existence of this right. He says: "But further, though, as I shall presently more fully state, I do not think the enjoyment of the elective franchise essential to citizenship, there can be no doubt it is one of the chiefest attributes of citizenship, under the American constitution; and the just and constitutional possession of this right is decisive evidence of citizenship. The provisions made by a constitution on this subject must, therefore, be looked to as bearing directly upon the question what persons are citizens under that constitution." Indeed it is often used in a general sense as meaning only a permanent resident. That is one of the definitions given by Webster. So, in *Field et al. v. Adreon et al.*, 7 Md. 209, it was held that a resident alien, who had not declared his intentions and was entitled to no political rights under the laws of the state, was still a "citizen" within the meaning of the attachment laws of that state against "absconding citizens." Yet, it is true, that in a political sense, the word citizen implies the possession of political rights. But the rights of voting and holding office are always given as the most complete and perfect attributes of citizenship. Thus, Webster gives the following definition: "In the United States, a person, native or naturalized, who has the privilege of exercising the elective franchise, or the qualifications which enable him to vote for rulers and to purchase and hold real estate." Bouvier's definition is as follows: "One who, under the constitution and laws of the United States, has a right to vote for representatives in congress and other public

officers, and who is qualified to fill offices in the gift of the people." Burrill gives the same definition.

Bearing in mind, then, that the inquiry relates only to such rights of citizenship as this state could confer, with respect to itself alone, how should it be determined upon our constitution, with respect to the class of persons to which the petitioner in this case belongs. The answer must be, that there is no room for doubt, that it was the intention to confer upon such persons, as far as it was possible for the state to do so, the full rights of state citizenship. In the first place, those persons had an equal voice with any other citizens in establishing the constitution itself. By section 9, article 14, they were authorized to vote upon its adoption or rejection. By the article on suffrage, they are made qualified electors, and are eligible to all offices, except as governor, lieutenant governor or judges. If the granting of these rights, the right to participate in establishing the very framework of the government, of an equal voice in choosing all officers under it, and the right to hold all offices with a very few exceptions, does not indicate an intention to create them citizens of the state, it is difficult to imagine from what such an intention could be inferred. This distinction between citizenship of the state and of the United States, is also very clearly implied in several provisions, both of the constitution and laws of this state. There, wherever the full right of citizenship of the United States is intended, it is so expressed, as in respect to the office of governor, lieutenant governor or judge, it is provided that no person shall be eligible who is not a "citizen of the United States." This form of expression never would have been used if it had been supposed that no person could be a citizen of the state without being also a citizen of the United States. In that case, the word "citizen" alone would have been used. An instance of this kind is found in the bill of rights, section 15, which provides that "no distinction shall ever be made by law between resident aliens and citizens, in reference to the possession, enjoyment or descent of property." Now it seems very clear that the words, "resident aliens," as here used, were not intended to include those who had declared their intentions to become citizens, and thereby become entitled, under the constitution, to all the rights of citizenship before referred to. The framers would hardly have assumed, that any distinction would have been made against them, in respect to rights of property. But this provision was intended for the benefit of those who were resident aliens simply, and all who were entitled to political rights, were included by the word "citizens," which meant only, citizens of this state.

So also the second section of the article on suffrage, which provides that no person "convicted of treason or felony shall be qualified to vote at any election unless restored to civil rights," clearly assumes that any elector under the constitution may be guilty of treason against the state; but he could not be guilty of treason unless a citizen. And if this class of persons are not citizens they might levy war against this state and adhere to its enemies; though, perhaps, filling at the same time some of its highest offices, and yet not be punishable for treason; a position in which it cannot be assumed that any government would intentionally place itself. It is also worthy of remark, that although

the state cannot make such persons full citizens of the United States, yet by making them electors of the state, it thereby gives them an equal voice with any other citizen, in choosing senators and representatives in congress, and also in choosing the President and Vice-President of the United States. For, by the constitution of the United States, representatives are chosen by the "qualified electors of the most numerous branch of the state legislature." Senators are chosen by the legislature, and presidential electors in such manner as the state legislature may direct. Notwithstanding, therefore, the constitution conferred upon congress the power of providing uniform naturalization laws; and, notwithstanding it must be admitted that an alien cannot become a full citizen of the United States except by complying with these laws, it must also be admitted that the state may, by conferring upon them the right of suffrage, enable them to have an equal voice with any other citizen in the government of the United States itself; and, although they may not be full citizens, they may well be said, in a general sense, to be citizens even of the United States.

Indeed, it was held in a memorable instance, fresh in the memory of all, that a foreigner who had declared his intentions under the laws of congress, in the state of New York, whose constitution and laws did not confer on him any political rights or make him a citizen of that state, although not a full citizen of the United States, was still a "domiciled citizen" invested with a national character as such, and entitled to the protection of our government abroad. And congress awarded a medal to the gallant commander Ingraham, who so promptly extended that protection to the Hungarian exile, who had declared his intention to become a citizen of the United States. The following extract from a letter of Secretary Marcy, in the correspondence which followed, is not inappropriate to the present discussion. He says: "This right to protect persons having a domicile, though not native born or naturalized citizens, rests on the firm foundation of justice; and the claim to be protected is earned by considerations which the protecting power is not at liberty to disregard. Such domiciled citizen pays the same price for his protection as native born or naturalized citizens pay for theirs. He is under the bonds of allegiance to the country of his residence, and if he breaks them incurs the same penalties; he owes the same obedience to the civil laws and must discharge the duties they impose on him; his property is in the same way and to the same extent, liable to contribute to the support of the government; in war he shares equally with them in the calamities which may befall the country; his services may be required for its defense; his life may be periled and sacrificed in maintaining its rights and vindicating its honor. In nearly all respects his and their condition, as to the duties and burdens of government are undistinguishable." If this is true in respect to the relation between the government of the United States and a foreigner, who has declared his intention to become a citizen, in a state which does not for that reason confer on him any political rights, it is much more true in a case where a state does confer upon such person the rights of citizenship and the qualifications of an elector, thereby making him also an elector of the United States, and

entitled to a voice in choosing its highest officers. And, upon the question of state citizenship, between the state and such person, so far as it is possible for the state to create state citizenship, there is no room for doubt. If then the liability of this petitioner to be drafted, depended upon the meaning of the word "citizen" in our state law, I should have no hesitation in saying that he was liable. In this act the word "citizen" only is used, but where the legislature intends full citizens of the United States, they say so. Thus in the law concerning jurors, it is provided that none shall be drawn who are not "citizens of the United States." A good reason for this discrimination is found in the fact that jurors are drawn by lot, and while persons who have declared their intentions are made electors and allowed to hold office, yet it might, perhaps, be safely assumed that no person not competent would be elected to office. But many foreigners who come here are not only unacquainted with our laws and modes of proceeding, but ignorant also of our language; and, jurors being drawn by lot, if all were liable to be drawn as soon as they had declared their intentions, many might be drawn who were wholly unable to discharge the duties. Hence this discrimination in the law on that subject; but no such reasons exist why these persons should not share the burdens of the common defense; therefore, the militia law drops the language which is used when a full citizenship of the United States is intended, and provides that all able bodied "citizens" shall be liable to military duty. This change of phraseology was not accidental or unmeaning, but was entirely based upon the well understood distinction between a citizen of the state merely, and a citizen of the United States. The commissioner who decided this case below, considered the change in our law from the word "person" to the word "citizen" as very important, and as having been done with the intention to exclude persons who had declared their intentions. But that change is easily accounted for without assuming any such purpose. The word person, in the old law, would have included aliens who had not declared their intentions at all. It was to exclude them that the change was made; and it does not at all warrant the conclusion that the legislature designed to exclude all who were not full citizens of the United States. On the contrary, by omitting the language with which that intention is always expressed, it appears clearly that they had no such purpose. And I think the word "citizen" was used in the acts of congress in the same sense. The original act of 1792, as already shown, provided for the enrollment of all "able bodied white male citizens of the respective states." This language expressly refers to a citizenship of the states; and, although the same language might sometimes be construed to mean only such a state citizenship, as brought the party within the full meaning of all the constitutional provisions of the United States; yet the very nature of the subject matter of this law, seems to me fully to exclude any such intention. It was a question merely as to what persons should be liable to share the burdens of the common defense, and as between the state and all persons, who by its constitution and laws, were made citizens of it; there can be no doubt that all such persons ought to share the burdens equally. And there is no ground for supposing that congress intended, by the words "citizens of the respective states," to

exclude any who were citizens to all intents and purposes, as between the state and them.

This conclusion is strengthened by the use of the word "white" in that law. The supreme court of the United States, in the *Dred Scott* case, 19 How. 420, 15 L. Ed. 691, says that the word "white" was used in this law "to exclude the African race, and the word 'citizen' to exclude unnaturalized foreigners."

Now, whether the use of the word "white" as qualifying "citizen," for the purpose of excluding the African race, would indicate, that in the opinion of congress, the African race could not be citizens at all, may perhaps be very questionable. Its use for such a purpose would, by the ordinary rules of construing language, seem to imply that those who used it, understood that if it was not so qualified the African race might be included by the word "citizens." If that race could not be citizens at all, they, as well as naturalized foreigners, would have been included simply by the word citizens. But assuming, as that court decided, that the African race could not be citizens, within the full meaning of that word, as used by the constitution of the United States, yet that they might be citizens of the states, in that sense in which each state could confer citizenship within itself, and that all this was understood by the congress which enacted this law, then the use of the word "white" for the purpose of excluding the African race, can only be accounted for, upon the theory that the word citizen was not used in its fullest constitutional sense, but as referring to the state citizenship before alluded to. It could only have been that meaning of the word "citizen" which justified or required the use of the word "white." And with this meaning, the word "citizen" would include persons in this state, of the class to which the petitioner belongs.

But even if there were doubts as to the correctness of this construction of the law of 1792, there can be none as to its correctness when applied to the act of July 17, 1862, under which this draft took place. In the first place, that act referred to the matter of the laws of the several states, where they were insufficient. So this if this state had had a law sufficiently providing a mode of drafting, the petitioner, being liable to enrollment as a citizen under our law, would have been included. But it is unreasonable to suppose that congress intended to allow such persons to be drafted where the state laws were sufficient, and yet to exclude them by the word "citizen" in cases where the President had to make rules and regulations for drafting. In this law, also, the word "white" is omitted, evidently for the purpose of removing the prohibition against the African race; for the 12th section expressly authorizes the President to receive them into the military or naval service. This shows that the word "citizen" is still used with reference merely to state citizenship. This conclusion is strengthened also, by the provisions of another act of the same date. Chapter 200, Laws of Congress, vol. 12, p. 594. The 21st section enacts that any alien who should volunteer in the service of the United States, and be afterwards honorably discharged, might become a citizen of the United States without any previous declaration of intention, and without being required to prove a previous residence of more than one year. Can it be possible that congress, anxious to fill the armies of the Un-

ion, and while passing one act to induce entire aliens, who had never declared their intentions at all, to enlist, intended, in another act passed at the same time, to exclude from liability to military duty, by the use of the word "citizen," those who had declared their intentions, who had become citizens of the state, and taken a part in the election of the highest officers of the United States? They never could have had such an intention. The word "citizen" referred to state citizenship, and was not intended to exclude those of the class to whom the petitioner belongs. The constitutions of several other states have extended to these persons rights of citizenship similar to those given by this state. They have enjoyed the privileges and protection of citizens; they have filled the offices, taken part in the enactment of state laws, and had an equal voice with others in the election of the officers and the enactment of the laws of the United States. They have found free homes among us, under our government established upon the principles of civil and religious liberty, and equality of rights among men. They have shared our prosperity, when we were prosperous and happy, and, by every principle of justice and every sentiment of honor, they ought to share the burdens in this hour of calamity and trial. And it is to be hoped that instead of shrinking from this high duty, they may be no less willing to bear their share of the burdens of war, than prompt to claim privilege and preferment in times of peace.

The order of the commissioner must be reversed.

5. Ex parte McROBERTS.

(Supreme Court of Iowa, 1864. 10 Iowa, 600.)

The writ in this case was issued July 19th, 1864, on the application of Captain Robert Lusby, of Company "K," of the 10th Regiment of Iowa Infantry, directed to H. M. Bush, Sheriff of Polk county, commanding him to produce the body of John McRoberts, together with the day and cause of his detention.

Upon the return of the writ, July 20, 1864, the facts of the case, as shown thereby, and by the stipulations of the respective counsel, are in substance as follows: That John McRoberts, on the ——— day of ———, 1861, volunteered into the United States military service for three years, and was duly mustered into such service as a member of Company "K," 10th Iowa Infantry, and that he has again re-enlisted and his term of service has not yet expired; that on the 20th day of June, 1864, he was granted a furlough for thirty days, at the expiration of which time he was to report to Captain Lusby, and rejoin his company and regiment at Davenport, Iowa; all the veterans of the regiment, including all officers, being home on furlough. On the 30th day of June, 1864, in the city of Des Moines, Polk county, Iowa, the said John McRoberts was charged with having shot one John Allen, a colored man, in the head, whereof he immediately died; that the said McRoberts was immediately arrested by the civil authorities, without any application whatever to the military authorities, and taken before a justice of the peace, and was by him committed to jail to await an

examination, which was, by agreement, fixed for a day after the commencement of a term of the District Court of Polk county; the mittimus commenced in the usual form, as follows: "An order having this day been made by me, A. Morris, a justice of the peace in and for Des Moines township, Polk county, Iowa, that John McRoberts be held to answer upon a charge of murder for a further hearing on, &c.," but was not otherwise signed by a justice of the peace, and was the only written authority by which the sheriff held McRoberts at the time the writ in this case was sued out.

It further appears that on the 19th day of July, 1864, the Grand Jury of Polk county returned into the District Court an indictment for murder against John McRoberts, properly indorsed "A true bill" and filed; that on the 19th day of July, 1864, a bench warrant was issued by the said District Court, which was duly served upon said accused, and he was brought into court, arraigned, and given further time to plead.

And it also appeared that no application has ever been made by the civil upon the military authorities for his delivery over, and that at the time of the commission of the alleged offense, the said John McRoberts was still on furlough, absent from his regiment and company, and was not acting or claiming to act under the orders or commands of any military officer; nor was he in the discharge, or pretending to be in the discharge of any military duty, and that no demand (except as by the writ of habeas corpus in this case), for the body of the said McRoberts had ever been made by any military officer whatever; and by reason of his restraint he would be unable to report for duty as required by his furlough.

COLE, J. The question presented in this case is one of great importance to the defendant not only, but is practically of the highest importance in its relations to the civil administration of the government, as well as to the military service.

There is not necessarily any conflict in this case between the civil and military authorities, but if there was such conflict, no person would now question, under our Federal Constitution, the rightful supremacy of the civil authority over the military. The counsel for the applicant concede this, as fully as it is claimed by the counsel for the State. But it is claimed in argument, that McRoberts was, at the time of the commission of the alleged offense, in the military service of the United States, and, therefore, within the exclusive jurisdiction of the federal military authorities, and that a State court cannot acquire any rightful jurisdiction over him for any purpose, during his term of service, except upon application duly made to the military authorities for his delivery over to the civil, and such delivery thereon made.

This claim is based upon chapter twenty of the laws of the first session of the ninth congress entitled "An act for establishing rules and articles for the government of the armies of the United States," approved April 10th, 1806. Article 33 is as follows: "When any commissioned officer or soldier, shall be accused of a capital crime, or of having used violence, or committed any offense against the persons or property of any citizen of any of the United States, such as is

punishable by the known laws of the land, the commanding officer, and officers of every regiment, troop or company, to which the person, or persons, so accused, shall belong, are hereby required, upon application duly made by, or in behalf of the party or parties injured, to use their utmost endeavors to deliver over such accused person or persons, to the civil magistrate, and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring him or them to trial. If any commanding officer or officers, shall wilfully neglect or shall refuse, upon the application aforesaid, to deliver over such accused person or persons, to the civil magistrates, or to be aiding and assisting to the officers of justice in apprehending such person or persons, the officer or officers, so offending, shall be cashiered." U. S. Statutes at Large, vol. 2, page 364.

Upon this article of war, as applied to the facts of this case, two questions naturally arise:

First. Is a soldier on furlough, so in the jurisdiction of the military and control of the commanding officer of his company or regiment, as that he may be "delivered over" upon application duly made?

Article 12 of the Laws of Congress, *supra*, provides for the granting of furloughs to officers and soldiers. A "furlough" is a leave or license given by a commanding officer to an officer or soldier to be absent from service for a certain time. (Webster's Dic.) Or, as it is given by Mr. Bouvier, "is a permission given in the army and navy to an officer or private to absent himself for a limited time." (Bouvier's Law Dic.) A soldier on furlough, then, is not necessarily in the custody or control of his commanding officer, for he has "permission to absent himself"; nor is he necessarily within the military jurisdiction, for he has "leave to be absent from service." When he is thus absent from the service and his commanding officer, he is not so in the custody of such officer as that he can be by him delivered over in the meaning of that term, as used in the article of war quoted *supra*.

To illustrate my meaning, suppose a party was arrested under a process from the United States Court, and was being held by virtue of such process, in open court, awaiting his trial. While in such condition, he could not be again arrested by virtue of another process issued from a State court. This is clear. But suppose his trial, for any cause, was postponed to another term, and he should give bail for his appearance at such subsequent term, and therefore have leave "to absent himself for a limited time," to wit, till such term, he could then be arrested again under the state process, without any conflict with the federal jurisdiction. A plea in this latter case, that he was within the federal jurisdiction, would be unavailing, since he had leave to depart or absent himself for a certain time from that jurisdiction, although he was bound to return to it, at a specified time, and might, under certain circumstances, be re-arrested and committed to its immediate jurisdiction before the expiration of that time.

So, with the soldier, while he continues in the actual military service, he is within the immediate jurisdiction of the military authorities, and being so held, he cannot be arrested on civil process, except in

the manner provided by the article of war relied upon by appellant's counsel in this case. But being permitted to absent himself from service, he is thereby without the military jurisdiction, and may, therefore, be arrested as any other person, and no conflict can arise. It can make no difference, even if true, that a soldier's furlough may be withdrawn at any time at the pleasure of his commanding officer, or that he may be arrested by such officer during its continuance, for, while his furlough remains in force, and he is absent from service on it, he is not within the military jurisdiction, and cannot be delivered over by its authorities until they shall first regain possession of him by arrest or otherwise, which arrest, for liability under the civil law, may as well be primarily done by the civil authorities as by the military.

Second. Was that article of war adopted to aid the civil authorities and jurisdiction, or to defeat such jurisdiction and make the military authority paramount?

A single reading of the article will satisfy and convince an impartial mind that the sole purpose of it was to aid the civil authorities in the administration of justice, and to place it out of the power of a criminal to escape the just civil penalties of his acts, by entering the military service or claiming its protection when in it. The article, to this end, requires all officers, not only to deliver over the accused, on proper demand, but also to render aid and assistance in apprehending and securing such person, in case he escapes the military and is not in their possession to deliver over. The language is not, that in case the soldier is accused of a crime, that the military shall arrest him and then deliver him over, but that the military shall "be aiding and assisting to the officers of justice in apprehending and securing the person so accused." If it had been the purpose and intent of the law that the primary jurisdiction should be exclusively with the military, it would have provided that when the offense had been committed and the person so accused had so escaped as that the military officer could not deliver him over upon application, that the military officers should cause his arrest and delivery over. But on the contrary, the article completely negatives the idea that the military is to take primary jurisdiction in his arrest and expressly provides that the civil authorities shall be principal actors in the arrest and that the military shall aid and assist in such arrest, when applied therefor.

The accused in this case was not at the time of the commission of the alleged offense in the actual custody or control of any military officer or command, but he was at large on furlough. Then it was not in the power of any officer to deliver him over on application; and the most that could be required by the civil authorities, or done by the military under article 33 (as above), would have been the requiring and rendering of their aid and assistance to the civil authorities in the arrest of the accused. But it so happened in this case that the civil authorities neither requested nor needed such aid or assistance, the arrest being made promptly without it. Can it be said, then, that the civil tribunal has no rightful jurisdiction, because the arrest was made without the request or necessity for military aid or assistance? I think not.

I have no occasion in this case to differ in the least from the doctrine laid down by the Supreme Court of the United States in *Ableman v. Booth*, and *United States v. Booth*, 21 How. 506, 16 L. Ed. 169, where it is said, that "the powers of the general government, and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres, and the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge, or a State court, as if the line of division was traced by landmarks and monuments visible to the eye." 21 How. 516, 16 L. Ed. 169.

Following this doctrine, I should have no hesitation in holding that neither a sheriff or any other State officer would have the right to go to a company or regiment or within the military lines or command of any military officer, and by virtue of a State process to arrest any officer or soldier within such military control for an offense committed, even outside of any military district; and because such officer has not the legal right to make arrests in such cases, the article of war relied upon in this case was adopted, whereby it becomes the duty of the civil officer to stop at the boundary line between the two jurisdictions, and there demand of the military officers the delivery of the accused, if in their jurisdiction, custody or control; but if the accused has fled and is not within the actual control of the military, the State officer has not yet reached his boundary line and may proceed and make the arrest alone, if he can, but if he cannot, he may call for the assistance of the military authorities and they are bound to render it.

While in the decision of this case, I am bound to look to the law as it is, and am not permitted to be influenced by considerations of public policy, which might demand legislative interference; yet, a doubtful construction of a statute may be rendered less doubtful by reference to the effect which must follow a different construction. If the construction contended for by the counsel for the relator is correct, it must follow that any civil arrest might be legal, or illegal, as it should ultimately be developed, whether the accused was a member of any military company in the United States service. If he was a member of any company or regiment, although absent from such service on furlough, then he is exempt from arrest, until, at least, the officer having the civil process can send a proper military officer for his delivery over. Such construction would result in great inconvenience, to say the least, and would, in a very large majority of heinous offenses, amount, by the opportunity for escape, to immunity for crime. While the true construction, it seems to me, is, that where the accused is in the custody or control of a military officer, an application should be made for his delivery; but if he is absent from service or control, either by furlough or escape, there is then no infringement of the military jurisdiction to pursue and arrest him with or without military assistance. Again, the accused in this case is charged with one of the highest offenses known to the law; and it being an offense against the civil authorities, committed when temporarily out of the

military service, and when not in the discharge of any military duty, he is not only liable to the civil penalties, but is entitled to the constitutional guarantees in relation to the manner of his trial. He may demand his constitutional right of a trial by a jury of his peers, and of the vicinage of his alleged offense; not only may he demand these rights, but it has been repeatedly held that he cannot waive them. If he may demand a jury trial, as he clearly can, may not the State also insist upon it? So that the administration of justice shall be uniform, and not one thing to one man and another to another.

If this accused shall elect to be tried by a "drum-head court-martial" and such election is granted, while another elects to claim his constitutional guarantee of a jury trial, which cannot be refused, what becomes of the civil administration of the government? What stability or uniformity or confidence would it have? Simply none.

But, it is claimed further, that the accused in this case is bound by his furlough to report himself to Capt. Lusby, at Davenport, on the 20th inst., and unless he does so he will be a deserter and liable to the penalties for desertion, and that by reason of the restraint by the sheriff over him he is prevented from keeping his obligations of furlough. These obligations ought to exert a potent restraining influence against the commission of crime, but they are not sufficient to break the tie which binds the criminal to the penalty for his acts. That a man cannot take advantage of his own wrong is a maxim now too well settled to need any argument.

In the view which I take of this case, it becomes unnecessary to discuss further the question of supposed conflict of jurisdiction between the District Court and the federal military authorities. It is clear that the District Court has jurisdiction of the offense charged and of the person of the accused, and there was nothing in the manner of his arrest, which can oust the District Court of such jurisdiction. The accused was not under the control of any military officer when arrested, and, therefore, ought not to be placed under such control.

It is a well settled doctrine that where the United States courts have jurisdiction, concurrent with the State courts, and the State courts first take jurisdiction of the particular case, such jurisdiction becomes, for that case, exclusive, and completely ousts the jurisdiction of the Federal courts. *Taylor et al. v. Carry*, 20 How. 583, 15 L. Ed. 1028; *Keating v. Spink*, 3 Ohio St. 105, 62 Am. Dec. 214.

And, certainly, the United States military authorities cannot claim a greater right, by virtue of their jurisdiction over the persons and offenses of alleged criminals conferred by the act of Congress, approved March 3d, 1863 (12 Stat. 731, c. 75), entitled, "An act for enrolling and calling out the national forces, and for other purposes," which are clearly also within the jurisdiction of the State courts, than is claimed by the United States judicial tribunals in like cases. In this view, then, this case being originally (if indeed it was, which may well be doubted), equally cognizable by the federal military and by the State courts, the latter having first acquired jurisdiction by the arrest of the accused, such jurisdiction became exclusive, and defeats any right of jurisdiction in this particular case on the part of the military.

My personal knowledge of the defendant, his family and their his-

tory, as well as his own generous and faithful military service, and his brave and unexceptionally exemplary conduct therein, during near three years, and his crowning act of devotion to his country, in his re-enlistment in the veteran corps, incline me involuntarily, to the most patient investigation and favorable consideration of his case, but I can see no avenue of escape from the conclusion that he must be held for condemnation or acquittal under that civil law, against which he is charged to have offended.

The prisoner, John McRoberts, is, therefore, remanded to the custody of the officer producing him under the writ.

6. TARBLE'S CASE.

(Supreme Court of the United States, 1871. 13 Wall. 397, 20 L. Ed. 597.)

[This was a proceeding by habeas corpus under the laws of Wisconsin to determine the rightfulness of the detention of a person by an officer of the United States army under the claim that he was a duly enlisted soldier. From a decision of the Supreme Court of the State, sustaining an order of release, the United States prosecuted a writ of error before this court.]

Mr. Justice FIELD, after stating the case, delivered the opinion of the court, as follows:

The important question is thus presented, whether a State court commissioner has jurisdiction, upon habeas corpus, to inquire into the validity of the enlistment of soldiers into the military service of the United States, and to discharge them from such service when, in his judgment, their enlistment has not been made in conformity with the laws of the United States. The question presented may be more generally stated thus: Whether any judicial officer of a State has jurisdiction to issue a writ of habeas corpus, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer of that government. For it is evident, if such jurisdiction may be exercised by any judicial officer of a State, it may be exercised by the court commissioner within the county for which he is appointed; and if it may be exercised with reference to soldiers detained in the military service of the United States, whose enlistment is alleged to have been illegally made, it may be exercised with reference to persons employed in any other department of the public service when their illegal detention is asserted. It may be exercised in all cases where parties are held under the authority of the United States, whenever the invalidity of the exercise of that authority is affirmed. The jurisdiction, if it exist at all, can only be limited in its application by the legislative power of the State. It may even reach to parties imprisoned under sentence of the National courts, after regular indictment, trial, and conviction, for offences against the laws of the United States. As we read the opinion of the Supreme Court of Wisconsin in this case, this is the claim of authority asserted by that tribunal for itself and for the judicial officers of that State. It does, indeed, disclaim any right of either to interfere with

parties in custody, under judicial sentence, when the National court pronouncing sentence had jurisdiction to try and punish the offenders, but it asserts, at the same time, for itself and for each of those officers, the right to determine, upon habeas corpus, in all cases, whether that court ever had such jurisdiction. In the case of Booth, which subsequently came before this court, it not only sustained the action of one of its justices in discharging a prisoner held in custody by a marshal of the United States, under a warrant of commitment for an offence against the laws of the United States, issued by a commissioner of the United States; but it discharged the same prisoner when subsequently confined under sentence of the District Court of the United States for the same offence, after indictment, trial, and conviction, on the ground that, in its judgment, the act of Congress creating the offence was unconstitutional; and in order that its decision in that respect should be final and conclusive, directed its clerk to refuse obedience to the writ of error issued by this court, under the act of Congress, to bring up the decision for review.

It is evident, as said by this court when the case of Booth was finally brought before it, if the power asserted by that State court existed, no offence against the laws of the United States could be punished by their own tribunals, without the permission and according to the judgment of the courts of the State in which the parties happen to be imprisoned; that if that power existed in that State court, it belonged equally to every other State court in the Union where a prisoner was within its territorial limits; and, as the different State courts could not always agree, it would often happen that an act, which was admitted to be an offence and justly punishable in one State, could be regarded as innocent, and even praiseworthy in another, and no one could suppose that a government, which had hitherto lasted for seventy years, "enforcing its laws by its own tribunals, and preserving the union of the States, could have lasted a single year, or fulfilled the trusts committed to it, if offences against its laws could not have been punished without the consent of the State in which the culprit was found."

The decision of this court in the two cases which grew out of the arrest of Booth, that of *Ableman v. Booth*, and that of *United States v. Booth*, 21 How. 506, 16 L. Ed. 169, disposes alike of the claim of jurisdiction by a State court, or by a State judge, to interfere with the authority of the United States, whether that authority be exercised by a Federal officer or be exercised by a Federal tribunal. In the first of these cases Booth had been arrested and committed to the custody of a marshal of the United States by a commissioner appointed by the District Court of the United States, upon a charge of having aided and abetted the escape of a fugitive slave. Whilst thus in custody a justice of the Supreme Court of Wisconsin issued a writ of habeas corpus directed to the marshal, requiring him to produce the body of Booth with the cause of his imprisonment. The marshal made a return, stating that he held the prisoner upon the warrant of the commissioner, a copy of which he annexed to and returned with the writ. To this return Booth demurred as insufficient in law to justify his detention, and, upon the hearing which followed, the

justice held his detention illegal, and ordered his discharge. The marshal thereupon applied for and obtained a certiorari, and had the proceedings removed to the Supreme Court of the State, where, after argument, the order of the justice discharging the prisoner from custody was affirmed. The decision proceeded upon the ground that the act of Congress respecting fugitive slaves was unconstitutional and void.

In the second case, Booth had been indicted for the offence with which he was charged before the commissioner, and from which the State judge had discharged him, and had been tried and convicted in the District Court of the United States for the District of Wisconsin, and been sentenced to pay a fine of \$1000, and to be imprisoned for one month. Whilst in imprisonment, in execution of this sentence, application was made by Booth to the Supreme Court of the State, for a writ of habeas corpus, alleging in his application that his imprisonment was illegal, by reason of the unconstitutionality of the fugitive slave law, and that the District Court had no jurisdiction to try or punish him for the matter charged against him. The court granted the application, and issued the writ, to which the sheriff, to whom the prisoner had been committed by the marshal, returned that he held the prisoner by virtue of the proceedings and sentence of the District Court, a copy of which was annexed to his return. Upon demurrer to this return, the court adjudged the imprisonment of Booth to be illegal, and ordered him to be discharged from custody, and he was accordingly set at liberty.

For a review in this court of the judgments in both of these cases, writs of error were prosecuted. No return, however, was made to the writs, the clerk of the Supreme Court of Wisconsin having been directed by that court to refuse obedience to them; but copies of the records were filed by the Attorney-General, and it was ordered by this court that they should be received with the same effect and legal operation as if returned by the clerk. The cases were afterwards heard and considered together, and the decision of both was announced in the same opinion. In that opinion the Chief Justice details the facts of the two cases at length, and comments upon the character of the jurisdiction asserted by the State judge and the State court; by the State judge to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner committed by him for an offence against the laws of the United States; and by the State court to supervise and annul the proceedings and judgment of a District Court of the United States, and to discharge a prisoner who had been indicted, tried, and found guilty of an offence against the laws of the United States and sentenced to imprisonment by that court.

And in answer to this assumption of judicial power by the judges and by the Supreme Court of Wisconsin thus made, the Chief Justice said as follows: If they "possess the jurisdiction they claim they must derive it either from the United States or the State. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the State to confer it, even if it had attempted to do so; for no State can authorize one of

its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States, is as far beyond the reach of the judicial process issued by a State judge or a State court as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offence against the laws of the State in which he was imprisoned."

It is in the consideration of this distinct and independent character of the government of the United States, from that of the government of the several States, that the solution of the question presented in this case, and in similar cases, must be found. There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each State stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The Constitution and the laws passed in pursuance of it, are declared by the Constitution itself to be the supreme law of the land, and the judges of every State are bound thereby, "anything in the constitution or laws of any State to the contrary notwithstanding." Whenever, therefore, any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the National Government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States. This temporary supremacy until judicial decision by the National tribunals, and the ultimate determination of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments. "The Constitution," as said by Mr. Chief Justice Taney, "was not framed merely to guard the States against danger from abroad, but chiefly to secure union and harmony at home; and to accomplish this end it was deemed necessary, when the Constitution was framed, that many of the rights of sovereignty which the States then possessed should be ceded to the General government; and that in the sphere

of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals without interruption from a State, or from State authorities." And the judicial power conferred extends to all cases arising under the Constitution, and thus embraces every legislative act of Congress, whether passed in pursuance of it, or in disregard of its provisions. The Constitution is under the view of the tribunals of the United States when any act of Congress is brought before them for consideration.

Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other.

Now, among the powers assigned to the National government, is the power to "raise and support armies," and the power "to provide for the government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offences, and prescribe their punishment. No interference with the execution of this power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service. Probably in every county and city in the several States there are one or more officers authorized by law to issue writs of habeas corpus on behalf of persons alleged to be illegally restrained of their liberty; and if soldiers could be taken from the army of the United States, and the validity of their enlistment inquired into by any one of these officers, such proceeding could be taken by all of them, and no movement could be made by the National troops without their commanders being subjected to constant annoyance and embarrassment from this source. The experience of the late rebellion has shown us that, in times of great popular excitement, there may be found in every State large numbers ready and anxious to embarrass the operations of the government, and easily persuaded to believe every step taken for the enforcement of its authority illegal and void. Power to issue writs of habeas corpus for the discharge of soldiers in the military service,

in the hands of parties thus disposed, might be used, and often would be used, to the great detriment of the public service. In many exigencies the measures of the National government might in this way be entirely bereft of their efficacy and value. An appeal in such cases to this court, to correct the erroneous action of these officers, would afford no adequate remedy. Proceedings on habeas corpus are summary, and the delay incident to bringing the decision of a State officer, through the highest tribunal of the State, to this court for review, would necessarily occupy years, and in the meantime, where the soldier was discharged, the mischief would be accomplished. It is manifest that the powers of the National Government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty.

It is true similar embarrassment might sometimes be occasioned, though in a less degree, by the exercise of the authority to issue the writ possessed by judicial officers of the United States, but the ability to provide a speedy remedy for any inconvenience following from this source would always exist with the National legislature.

State judges and State courts, authorized by laws of their States to issue writs of habeas corpus, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the State; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process or orders, under which the prisoner is held, should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer, in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere pretence of having such authority.

This right to inquire by process of habeas corpus, and the duty of the officer to make a return, "grows necessarily," says Mr. Chief Justice Taney, "out of the complex character of our government and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its power, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the

dominion and jurisdiction of another government, and that neither the writ of habeas corpus nor any other process issued under State authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress."

Some attempt has been made in adjudications, to which our attention has been called, to limit the decision of this court in *Ableman v. Booth*, and *United States v. Booth*, to cases where a prisoner is held in custody under undisputed lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority. But it is evident that the decision does not admit of any such limitation. It would have been unnecessary to enforce, by any extended reasoning, such as the Chief Justice uses, the position that when it appeared to the judge or officer issuing the writ, that the prisoner was held under undisputed lawful authority, he should proceed no further. No Federal judge ever could, in such case, release the party from imprisonment, except upon bail when that was allowable. The detention being by admitted lawful authority, no judge could set the prisoner at liberty, except in that way, at any stage of the proceeding. All that is meant by the language used is, that the State judge or State court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States; that is, an authority, the validity of which is to be determined by the Constitution and laws of the United States. If a party thus held be illegally imprisoned it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release.

This limitation upon the power of State tribunals and State officers furnishes no just ground to apprehend that the liberty of the citizen would thereby be endangered. The United States are as much interested in protecting the citizen from illegal restraint under their authority, as the several States are to protect him from the like restraint under their authority, and are no more likely to tolerate any oppression. Their courts and judicial officers are clothed with the power to issue the writ of habeas corpus in all cases, where a party is illegally restrained of his liberty by an officer of the United States, whether such illegality consist in the character of the process, the authority of the officer, or the invalidity of the law under which he is held. And there is no just reason to believe that they will exhibit any hesitation to exert their power, when it is properly invoked. Certainly there can be no ground for supposing that their action will be less prompt and efficient in such cases than would be that of State tribunals and State officers. In the matter of *Seavey*, 3 Cliff. 439, Fed. Cas. No. 12,596; In the matter of *Keeler*, Hempst. 306, Fed. Cas. No. 7,637.

It follows, from the views we have expressed, that the court commissioner of Dane County was without jurisdiction to issue the writ

of habeas corpus for the discharge of the prisoner in this case, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer of the United States, under claim and color of the authority of the United States, as an enlisted soldier mustered into the military service of the National government; and the same information was imparted to the commissioner by the return of the officer. The commissioner was, both by the application for the writ and the return to it, apprised that the prisoner was within the dominion and jurisdiction of another government, and that no writ of habeas corpus issued by him could pass over the line which divided the two sovereignties.

The conclusion we have reached renders it unnecessary to consider how far the declaration of the prisoner as to his age, in the oath of enlistment, is to be deemed conclusive evidence on that point on the return to the writ.

Judgment reversed.

Mr. Chief Justice CHASE delivered a dissenting opinion.

7. FT. LEAVENWORTH R. CO. v. LOWE.

(Supreme Court of the United States, 1885. 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264.)

In Error to the Supreme Court of the State of Kansas.

FIELD, J. The plaintiff, a corporation organized under the laws of Kansas, was in 1880, and has ever since been, the owner of a railroad in the reservation of the United States in that state, known as the "Fort Leavenworth Military Reservation." In that year its track, right of way, franchises, road-bed, telegraph line, and instruments connected therewith, on the reservation, were assessed by the board of assessors of the state, and a tax of \$394.40 levied thereon, which was paid by the railroad company under protest, in order to prevent a sale of the property. The present action is brought to recover back the money thus paid, on the ground that the property, being entirely within the reservation, was exempt from assessment and taxation by the state.

The land constituting the reservation was part of the territory acquired in 1803 by cession from France, and, until the formation of the state of Kansas, and her admission into the Union, the United States possessed the rights of a proprietor, and had political dominion and sovereignty over it. For many years before that admission it had been reserved from sale by the proper authorities of the United States for military purposes, and occupied by them as a military post. The jurisdiction of the United States over it during this time was necessarily paramount. But in 1861 Kansas was admitted into the Union upon an equal footing with the original states; that is, with the same rights of political dominion and sovereignty, subject like them only to the constitution of the United States. Congress might undoubtedly, upon such admission, have stipulated for retention of the political authority, dominion, and legislative power of the United States over

the reservation, so long as it should be used for military purposes by the government; that is, it could have excepted the place from the jurisdiction of Kansas, as one needed for the uses of the general government. But from some cause, inadvertence perhaps, or overconfidence that a recession of such jurisdiction could be had whenever desired, no such stipulation or exception was made. The United States, therefore, retained, after the admission of the state, only the rights of an ordinary proprietor; except as an instrument for the execution of the powers of the general government, that part of the tract, which was actually used for a fort or military post, was beyond such control of the state, by taxation or otherwise, as would defeat its use for those purposes. So far as the land constituting the reservation was not used for military purposes, the possession of the United States was only that of an individual proprietor. The state could have exercised, with reference to it, the same authority and jurisdiction which she could have exercised over similar property held by private parties. This defect in the jurisdiction of the United States was called to the attention of the government in 1872. In April of that year the secretary of war addressed a communication to the attorney general, inclosing papers touching the reservation, and submitting for his official opinion the questions, whether, under the constitution, the reservation of the land for a site as a military post and for public buildings took it out of the operation of the law of March 3, 1859, (11 Stat. 430,) and, if so, what action would be required on the part of the executive or congress to restore the land to the exclusive jurisdiction of the United States. The attorney general replied that the act admitting Kansas as a state into the Union had the effect to withdraw from federal jurisdiction all the territory within the boundaries of the new state, excepting only that of the Indians having treaties with the United States, which provided that without their consent such territory should not be subject to state jurisdiction, and the reservation was not within this exception; and that to restore the federal jurisdiction over the land included in the reservation, it would be necessary to obtain from the state of Kansas a cession of jurisdiction, which he had no doubt would, upon application, be readily granted by the state legislature. 14 Op. Attys. Gen. 33. It does not appear from the record before us that such application was ever made; but, on the twenty-second of February, 1875, the legislature of the state passed an act entitled "An act to cede jurisdiction to the United States over the territory of the Fort Leavenworth military reservation," the first section of which is as follows:

"That exclusive jurisdiction be, and the same is hereby, ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States military reservation known as the 'Fort Leavenworth Reservation' in said state, as declared from time to time by the president of the United States, saving, however, to the said state the right to serve civil or criminal process within said reservation, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said state, but outside of said cession and reservation; and saving further to said state the right to tax railroad, bridge, and other cor-

porations, their franchises and property, on said reservation." *Laws Kan.* 1875, p. 95.

The question as to the right of the plaintiff to recover back the taxes paid depends upon the validity and effect of the last saving clause in this act. As we have said, there is no evidence before us that any application was made by the United States for this legislation, but, as it conferred a benefit, the acceptance of the act is to be presumed in the absence of any dissent on their part. The contention of the plaintiff is that the act of cession operated under the constitution to vest in the United States exclusive jurisdiction over the reservation, and that the last saving clause, being inconsistent with that result, is to be rejected. The constitution provides that "congress shall have power to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." Article 1, § 8.

The necessity of complete jurisdiction over the place which should be selected as the seat of government was obvious to the framers of the constitution. Unless it were conferred, the deliberations of congress might, in times of excitement, be exposed to interruptions without adequate means of protection; its members, and the officers of the government, be subjected to insult and intimidation, and the public archives be in danger of destruction. The *Federalist*, in support of this clause in the constitution, in addition to these reasons, urged that "a dependence of the members of the general government on the state comprehending the seat of the government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the confederacy." No. 43.

The necessity of supreme legislative authority over the seat of government was forcibly impressed upon the members of the constitutional convention by occurrences which took place near the close of the revolutionary war. At that time, while congress was in session in Philadelphia, it was surrounded and insulted by a body of mutineers of the continental army. In giving an account of this proceeding, Mr. Rawle, in his *Treatise on the Constitution*, says of the action of congress: "It applied to the executive authority of Pennsylvania for defense; but, under the ill-conceived constitution of the state at that time, the executive power was vested in a council, consisting of thirteen members, and they possessed or exhibited so little energy, and such apparent intimidation, that the congress indignantly removed to New Jersey, whose inhabitants welcomed it with promises of defending it. It remained for some time at Princeton without being again insulted, till, for the sake of greater convenience, it adjourned to Annapolis. The general dissatisfaction with the proceedings of the executive authority of Pennsylvania, and the degrading spectacle of a fugitive congress, suggested the remedial provisions now under con-

sideration." Rawle, 113. Of this proceeding Mr. Justice Story remarks: "If such a lesson could have been lost upon the people, it would have been as humiliating to their intelligence as it would have been offensive to their honor." 2 Comm. Const. § 1219.

Upon the second part of the clause in question, giving power to "exercise like authority,"—that is, of exclusive legislation "over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings,"—the Federalist observes that the necessity of this authority is not less evident. "The public money expended on such places," it adds, "and the public property deposited in them, require that they should be exempt from the authority of the particular state. Nor would it be proper for the places on which the security of the entire Union may depend, to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated by requiring the concurrence of the states concerned in every such establishment." "The power," says Mr. Justice Story, repeating the substance of Mr. Madison's language, "is wholly unexceptionable, since it can only be exercised at the will of the state, and therefore it is placed beyond all reasonable scruple." This power of exclusive legislation is to be exercised, as thus seen, over places purchased, by consent of the legislatures of the states in which they are situated, for the specific purposes enumerated. It would seem to have been the opinion of the framers of the constitution that, without the consent of the states, the new government would not be able to acquire lands within them; and therefore it was provided that when it might require such lands for the erection of forts and other buildings for the defense of the country, or the discharge of other duties devolving upon it, and the consent of the states in which they were situated was obtained for their acquisition, such consent should carry with it political dominion and legislative authority over them. Purchase with such consent was the only mode then thought of for the acquisition by the general government of title to lands in the states. Since the adoption of the constitution this view has not generally prevailed. Such consent has not always been obtained, nor supposed necessary, for the purchase by the general government of lands within the states. If any doubt has ever existed as to its power thus to acquire lands within the states, it has not had sufficient strength to create any effective dissent from the general opinion. The consent of the states to the purchase of lands within them for the special purposes named, is, however, essential, under the constitution, to the transfer to the general government, with the title, of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the states equally with the property of private individuals.

But not only by direct purchase have the United States been able to acquire lands they needed without the consent of the states, but it has been held that they possess the right of eminent domain within the

states, using those terms, not as expressing the ultimate dominion, or title to property, but as indicating the right to take private property for public uses when needed to execute the powers conferred by the constitution; and that the general government is not dependent upon the caprice of individuals, or the will of state legislatures, in the acquisition of such lands as may be required for the full and effective exercise of its powers. This doctrine was authoritatively declared in *Kohl v. U. S.*, 91 U. S. 367, 23 L. Ed. 449. All the judges of the court agreed in the possession by the general government of this right, although there was a difference of opinion whether provision for the exercise of the right had been made in that case. The court, after observing that lands in the states are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses and court-houses, and for other public uses, said: "If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a state, prohibiting a sale to the federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a state, or even upon that of a private citizen." The right to acquire property in this way, by condemnation, may be exerted either through tribunals expressly designated by congress, or by resort to tribunals of the state in which the property is situated, with her consent for that purpose. Such consent will always be presumed in the absence of express prohibition. *U. S. v. Jones*, 109 U. S. 513, 519, 3 Sup. Ct. 346, 27 L. Ed. 1015; *Matter of Petition of U. S.*, 96 N. Y. 227.

Besides these modes of acquisition, the United States possessed, on the adoption of the constitution, an immense domain lying north and west of the Ohio river, acquired as the result of the revolutionary war, from Great Britain, or by cessions from Virginia, Massachusetts, and Connecticut; and, since the adoption of the constitution they have, by cession from foreign countries, come into the ownership of a territory still larger, lying between the Mississippi river and the Pacific ocean, and out of these territories several states have been formed and admitted into the Union. The proprietorship of the United States in large tracts of land within these states has remained after their admission. There has been, therefore, no necessity for them to purchase or to condemn lands within those states, for forts, arsenals, and other public buildings, unless they had disposed of what they afterwards needed. Having the title, they have usually reserved certain portions of their lands from sale or other disposition, for the uses of the government.

This brief statement as to the different modes in which the United States have acquired title to lands upon which public buildings have been erected, will serve to explain the nature of their jurisdiction over such places, and the consistency with each other of decisions on the subject by federal and state tribunals, and of opinions of the attorneys general. When the title is acquired by purchase by consent of the legislatures of the states, the federal jurisdiction is exclusive of all state authority. This follows from the declaration of the constitution that congress shall have "like authority" over such places as it has over

the district which is the seat of government; that is, the power of "exclusive legislation in all cases whatsoever." Broader or clearer language could not be used to exclude all other authority than that of congress; and that no other authority can be exercised over them has been the uniform opinion of federal and state tribunals, and of the attorneys general. The reservation which has usually accompanied the consent of the states that civil and criminal process of the state courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them, but is admitted to prevent them from becoming an asylum for fugitives from justice. And congress, by statute passed in 1795, declared that cessions from the states of the jurisdiction of places where light-houses, beacons, buoys, or public piers were or might be erected, with such reservations, should be deemed sufficient for the support and erection of such structures, and if no such reservation had been made, or in future cessions for those purposes should be omitted, civil and criminal process issued under the authority of the state or of the United States might be served and executed within them. 1 Stat. 426, c. 40.

Thus, in *U. S. v. Cornell*, 2 Mason, 60, Fed. Cas. No. 14,867, it was held by Mr. Justice Story that the purchase of land by the United States for public purposes, within the limits of a state, did not of itself oust the jurisdiction or sovereignty of the state over the lands purchased; but that the purchase must be by consent of the legislature of the state, and then the jurisdiction of the United States under the constitution became exclusive. In that case the defendant was indicted for murder committed in Fort Adams, in Newport harbor, Rhode Island. The place had been purchased by the United States with the consent of the state, to which was added the reservation mentioned, as to the service of civil and criminal process within it. The main questions presented for decision were, whether the sole and exclusive jurisdiction over the place vested in the United States without a formal act of cession, and whether the reservation as to service of process made the jurisdiction concurrent with that of the state. The first question was answered, as above, that the purchase by consent gave the exclusive jurisdiction; and, as to the second question, the court said: "In its terms, it certainly does not contain any reservation of concurrent jurisdiction or legislation. It provides only that civil and criminal process issued under the authority of the state, which must, of course, be for acts done within and cognizable by the state, may be executed within the ceded lands, notwithstanding the cession. Not a word is said from which we can infer that it was intended that the state should have a right to punish for acts done within the ceded lands. The whole apparent object is answered by considering the clause as meant to prevent these lands from becoming a sanctuary for fugitives from justice for acts done within the acknowledged jurisdiction of the state. Now, there is nothing incompatible with the exclusive sovereignty or jurisdiction of one state that it should permit another state in such cases to execute its process within its limits. And a cession of exclusive jurisdiction may well be made with a reservation of a right of this nature, which then operates only as a condition annexed to the cession, and as an agreement of the new sovereign to permit its

free exercise, as quoad hoc his own process. This is the light in which clauses of this nature (which are very frequent in grants made by the states to the United States) have been received by this court on various occasions on which the subject has been heretofore brought before it for consideration, and it is the same light in which it has also been received by a very learned state court. In our judgment it comports entirely with the apparent intention of the parties, and gives effect to acts which might otherwise, perhaps, be construed entirely nugatory. For it may well be doubted whether congress is, by the terms of the constitution, at liberty to purchase lands for forts, dock-yards, etc., with the consent of the state legislature, where such consent is so qualified that it will not justify the exclusive legislation of congress there. It may well be doubted if such consent be not utterly void. *Ut res magis valeat quam pereat*, we are bound to give the present act a different construction if it may reasonably be done; and we have not the least hesitation in declaring that the true interpretation of the present proviso leaves the sole and exclusive jurisdiction of Fort Adams in the United States."

The case referred to in which the subject was considered by a learned state court is that of *Com. v. Clary*, 8 Mass. 72. There the supreme court of Massachusetts held that the courts of the commonwealth could not take cognizance of offenses committed upon lands in the town of Springfield, purchased with the consent of the commonwealth by the United States, for the purpose of erecting arsenals upon them. That was the case of a prosecution against the defendant for selling spirituous liquors on the land without a license, contrary to a statute of the state. But the court held that the law had no operation within the lands mentioned. "The territory," it said, "on which the offense charged is agreed to have been committed, is the territory of the United States, over which the congress have exclusive power of legislation." It added, that "the assent of the commonwealth to the purchase of this territory by the United States had this condition annexed to it: that civil and criminal process might be served therein by the officers of the commonwealth. This condition was made with a view to prevent the territory from becoming a sanctuary for debtors and criminals; and from the subsequent assent of the United States to the said condition, evidenced by their making the purchase, it results that the officers of the commonwealth, in executing such process, act under the authority of the United States. No offenses committed within that territory are committed against the laws of this commonwealth, nor can such offenses be punishable by the courts of the commonwealth, unless the congress of the United States should give to the said courts jurisdiction thereof." In *Mitchell v. Tibbetts*, before the same court, years afterwards, (17 Pick. [Mass.] 298,) it was held that a vessel employed in transporting stone from Maine to the navy-yard in Charlestown, Massachusetts, a place purchased by the United States, with the consent of the state, was not employed in transporting stone within the commonwealth, and therefore committed no offense in disregarding a statute making certain requirements of vessels thus employed. The court said that to bring a vessel within the description of the statute, she must be employed in landing stone at, or taking stone from, some place

in the commonwealth, and that the law of Massachusetts did not extend to and operate within the territory ceded; adopting the principle of its previous decision in 8 Mass. 72. In March, 1841, the house of representatives of Massachusetts requested of the justices of the supreme judicial court of that state their opinion whether persons residing on lands in that state purchased by or ceded to the United States for navy-yards, arsenals, dock-yards, forts, light-houses, hospitals, and armories, were entitled to the benefits of the state common schools for their children in the towns where such lands were located; and the justices replied that, "where the general consent of the commonwealth is given to the purchase of territory by the United States for forts and dock-yards, and where there is no other condition or reservation in the act granting such consent, but that of a concurrent jurisdiction of the state for the service of civil process and criminal process against persons charged with crimes committed out of such territory, the government of the United States has the sole and exclusive jurisdiction over such territory for all purposes of legislation and jurisprudence with the single exception expressed; and consequently that no persons are amenable to the laws of the commonwealth for crimes and offenses committed within said territory; and that persons residing within the same do not acquire the civil and political privileges, nor do they become subject to the civil duties and obligations, of inhabitants of the towns within which such territory is situated." And accordingly they were of opinion that persons residing on such lands were not entitled to the benefits of the common schools for their children in the towns in which such lands were situated. Opinion of Justices, 1 Metc. 580.

In *Sinks v. Reese*, 19 Ohio St. 306, 2 Am. Rep. 397, the question came before the supreme court of Ohio as to the effect of a proviso in the act of that state, ceding to the United States its jurisdiction over lands within her limits for the purposes of a national asylum for disabled volunteer soldiers, which was that nothing in the act should be construed to prevent the officers, employes, and inmates of the asylum, who were qualified voters of the state, from exercising the right of suffrage at all township, county, and state elections in the township in which the national asylum should be located. And it was held that, upon the purchase of the territory by the United States, with the consent of the legislature of the state, the general government became invested with exclusive jurisdiction over it and its appurtenances in all cases whatsoever; and that the inmates of such asylum resident within the territory, being within such exclusive jurisdiction, were not residents of the state so as to entitle them to vote, within the meaning of the constitution, which conferred the elective franchise upon its residents alone.

To the same effect have been the opinions of the attorney general, when called for by the head of one of the departments. Thus, in the case of Armory at Harper's Ferry, in Virginia, the question arose whether officers of the army, or other persons, residing in the limits of the armory, the lands composing which had been purchased by consent of the state, were liable to taxation by her. The consent had been accompanied by a cession of jurisdiction, with a declaration that the state retained concurrent jurisdiction with the United States over the

place, so far as it could consistently with the acts giving consent to the purchase and ceding jurisdiction; and that its courts, magistrates, and officers might take such cognizance, execute such processes, and discharge such other legal functions within it as might not be incompatible with the true intent and meaning of those acts. The question having been submitted to the attorney general, he replied that the sole object and effect of the reservation was to prevent the place from becoming a sanctuary for fugitives from justice, for acts done within the acknowledged jurisdiction of the state, and that in all other respects the extraterritoriality of the armory at Harper's Ferry was complete, in so far as regards the state; that the persons in the employment of the United States, actually residing in the limits of the armory, did not possess the civil and political rights of citizens of the state, nor were they subject to the tax and other obligations of such citizens. 6 Op. Attys. Gen. 577. See, also, the case of *The New York Post-office Site*, 10 Op. Attys. Gen. 35. These authorities are sufficient to support the proposition, which follows naturally from the language of the constitution, that no other legislative power than that of congress can be exercised over lands, within a state, purchased by the United States, with her consent, for one of the purposes designated; and that such consent, under the constitution, operates to exclude all other legislative authority.

But with reference to lands owned by the United States, acquired by purchase without the consent of the state, or by cessions from other governments, the case is different. Story, in his *Commentaries on the Constitution*, says: "If there has been no cession by the state of the place, although it has been constantly occupied and used under purchase, or otherwise, by the United States for a fort or arsenal, or other constitutional purpose, the state jurisdiction still remains complete and perfect;" and in support of this statement he refers to *People v. Godfrey*, 17 Johns. (N. Y.) 225. In that case the land on which Fort Niagara was erected, in New York, never having been ceded by the state to the United States, it was adjudged that the courts of the state had jurisdiction of crimes or offenses against the laws of the state committed within the fort or its precincts, although it had been garrisoned by the troops of the United States, and held by them since its surrender by Great Britain, pursuant to the treaties of 1793 and 1794. In deciding the case the court said that the possession of the post by the United States must be considered as a possession for the state, not in derogation of her rights, observing that it regarded it as a fundamental principle that the rights of sovereignty were not to be taken away by implication. "If the United States," the court added, "had the right of exclusive legislation over the fortress of Niagara, they would have also exclusive jurisdiction; but we are of opinion that the right of exclusive legislation within the territorial limits of any state, can be acquired by the United States only in the mode pointed out in the constitution,—by purchase, by consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. The essence of that provision is that the state shall freely cede the particular place to the United States for one of the specific and enumerated objects. This

jurisdiction cannot be acquired tortiously or by disseizin of the state; much less can it be acquired by mere occupancy, with the implied or tacit consent of the state, when such occupancy is for the purpose of protection."

Where, therefore, lands are acquired in any other way by the United States within the limits of a state than by purchase with her consent, they will hold the land subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general government. Their exemption from state control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the state over the places acquired will be as full and complete as over any other places within her limits.

As already stated, the land constituting the Fort Leavenworth military reservation was not purchased, but was owned by the United States by cession from France many years before Kansas became a state; and whatever political sovereignty and dominion the United States had over the place comes from the cession of the state since her admission into the Union. It not being a case where exclusive legislative authority is vested by the constitution of the United States, that cession could be accompanied with such conditions as the state might see fit to annex, not inconsistent with the free and effective use of the fort as a military post.

In the recent case of The Fort Porter Military Reservation, the opinion of the attorney general was in conformity with this view of the law. On the twenty-eighth of February, 1842, the legislature of New York authorized the commissioners of its land-office to cede to the United States the title to certain land belonging to the state within her limits, "for military purposes, reserving a free and uninterrupted use and control in the canal commissioners of all that may be necessary for canal and harbor purposes." Under this act the title was conveyed to the United States. The act also ceded to them jurisdiction over the land. In 1880 the superintendent of public works of New York, upon whom the duties of canal commissioner were devolved, informed the secretary of war that the interests of the state required that the land, or a portion of it, should be occupied by her for canal purposes, claiming the right to thus occupy it under the reservation in the act of cession. The opinion of the attorney general was, therefore, requested as to the authority of the secretary of war to permit the state, under these considerations, to use so much of the land as would not interfere with its use for military purposes. The attorney general replied that the United States, under the grant, held the land for military purposes, and that the reservation in favor of the state could be deemed valid only so far as it was not repugnant to the grant; that, hence, the right of the state to occupy and use the premises for canal or harbor purposes must be regarded as limited or restricted by the purposes of the grant;

that, when such use and occupation would defeat or interfere with those purposes, the right of the state did not exist; but, when they would not interfere with those purposes, the state was entitled to use so much of the land as might be necessary for her canal and harbor purposes. 16 Op. Attys. Gen. 592.

We are here met with the objection that the legislature of a state has no power to cede away her jurisdiction and legislative power over any portion of her territory, except as such cession follows under the constitution from her consent to a purchase by the United States for some one of the purposes mentioned. If this were so it would not aid the railroad company; the jurisdiction of the state would then remain as it previously existed. But, aside from this consideration, it is undoubtedly true that the state, whether represented by her legislature, or through a convention specially called for that purpose, is incompetent to cede her political jurisdiction and legislative authority over any part of her territory to a foreign country, without the concurrence of the general government. The jurisdiction of the United States extends over all the territory within the states, and therefore their authority must be obtained, as well as that of the state within which the territory is situated, before any cession of sovereignty or political jurisdiction can be made to a foreign country. And so when questions arose as to the north-eastern boundary, in Maine, between Great Britain and the United States, and negotiations were in progress for a treaty to settle the boundary, it was deemed necessary on the part of our government to secure the co-operation and concurrence of Maine, so far as such settlement might involve a cession of her sovereignty and jurisdiction as well as title to territory claimed by her, and of Massachusetts, so far as it might involve a cession of title to lands held by her. Both Maine and Massachusetts appointed commissioners to act with the secretary of state, and after much negotiation the claims of the two states were adjusted, and the disputed questions of boundary settled. The commissioners of Maine were appointed by her legislature; and those of Massachusetts by her governor, under authority of an act of her legislature. It was not deemed necessary to call a convention of the people in either of them to give to the commissioners the requisite authority to act effectively for their respective states. 5 Webst. Works, 99; 6 Webst. 273.

In their relation to the general government, the states of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the state, they are not those of a different country; and the two, the state and general government, may deal with each other in any way they may deem best to carry out the purposes of the constitution. It is for the protection and interests of the states, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the states. As instrumentalities for the execution of the powers of the general government, they are, as already said, exempt from such control of the states as would defeat or impair their use for those purposes; and if, to their more effective use, a cession of legislative au-

thority and political jurisdiction by the state would be desirable, we do not perceive any objection to its grant by the legislature of the state. Such cession is really as much for the benefit of the state as it is for the benefit of the United States. It is necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used, the jurisdiction reverts to the state.

The military reservation of Fort Leavenworth was not, as already said, acquired by purchase with the consent of Kansas. And her cession of jurisdiction is not of exclusive legislative authority over the land, except so far as that may be necessary for its use as a military post; and it is not contended that the saving clause in the act of cession interferes with such use. There is, therefore, no constitutional prohibition against the enforcement of that clause. The right of the state to subject the railroad property to taxation exists as before the cession. The invalidity of the tax levied not being asserted on any other ground than the supposed exclusive jurisdiction of the United States over the reservation, notwithstanding the saving clause, the judgment of the court below must be affirmed.

Ordered accordingly.

8. COMMONWEALTH v. MURPHY.

(Supreme Judicial Court of Massachusetts, 1896. 166 Mass. 171, 44 N. E. 138, 32 L. R. A. 606.)

Appeal from superior court, Suffolk county; Edgar J. Sherman, Judge.

James A. Murphy was convicted for parading with an unauthorized body of men with firearms, and appeals. Affirmed.

ALLEN, J. The defendant is complained of for belonging to and parading with a certain unauthorized body of men with arms, which said body of men had associated themselves together as a company and organization for drill and parade with firearms, in violation of St. 1893, c. 367, § 124. He contends that this statute is in contravention of the seventeenth article of the declaration of rights, which declares that "the people have a right to keep and bear arms for the common defense." This view cannot be supported. The right to keep and bear arms for the common defense does not include the right to associate together as a military organization, or to drill and parade with arms in cities and towns, unless authorized so to do by law. This is a matter affecting the public security, quiet, and good order, and it is within the police powers of the legislature to regulate the bearing of arms, so as to forbid such unauthorized drills and parades. *Presser v. State of Illinois*, 116 U. S. 252, 264, 265, 6 Sup. Ct. 580, 29 L. Ed. 615; *Dunne v. People*, 94 Ill. 120, 34 Am. Rep. 213. The protection of a similar constitutional provision has often been sought by persons charged with carrying concealed weapons, and it has been almost universally held that the legislature may regulate and limit the mode of carrying arms. *Andrews v. State*, 3 Heisk. (Tenn.) 165, 8 Am. Rep. 8; *Aymette v. State*, 2 Humph.

(Tenn.) 154; *Wilson v. State*, 33 Ark. 557, 34 Am. Rep. 52; *Haile v. State*, 38 Ark. 564, 42 Am. Rep. 3; *English v. State*, 35 Tex. 473, 14 Am. Rep. 374; *State v. Reid*, 1 Ala. 612, 35 Am. Dec. 44; *State v. Wilforth*, 74 Mo. 528, 41 Am. Rep. 330; *State v. Mitchell*, 3 Blackf. (Ind.) 229; *Bish. St. Crimes*, § 793. The early decision to the contrary, of *Bliss v. Com.*, 2 Litt. (Ky.) 90, 13 Am. Dec. 251, has not been generally approved.

The defendant further contends that this statute, which mentions certain military bodies as exempt from its operation, is class legislation, which grants exclusive privileges to certain classes of citizens which are denied to the body of the people. It is not contended that the troops of the United States or the regularly organized militia of the commonwealth should be forbidden to drill and parade; but the argument is that the legislature has no power to single out other independent organizations, and give to them peculiar rights which it denies to others. But, in regulating drills and public parades, it is for the legislature to determine how far to go. No independent military company has a constitutional right to parade with arms in our cities and towns, and the granting of this privilege to certain enumerated organizations does not carry with it the same privilege to all others. It is within the power of the legislature to determine, in reference to such independent organizations, which of them may, and which of them may not, associate together and organize for drill and parade with firearms. No decision has been cited to us which intimates the contrary. The granting to certain persons of special privileges of this kind, which do not interfere with the rights of others, is not open to objection on constitutional grounds.

It appeared in evidence that the defendant, with 10 or 12 other men, formed one company in the parade, and that all the men in this company carried ordinary breech-loading Springfield rifles, which had been altered and bored in the barrel near the breech, and the firing pins had also been filed down, so as to make them immovable; and in this condition they could not discharge a missile by means of gunpowder or any other explosive. The defendant contends that these weapons were not "firearms," within the meaning of the statute. The purpose for which these alterations were made is not disclosed. They would not be obvious to the ordinary observer, while the rifles were carried in the parade. So far as appearance went, it was a parade with firearms which were efficient for use. To the public eye, it was a parade in direct violation of the statute. The men who carried these weapons could not actually fire them, but it would be generally supposed that they could. With the exception of the danger of being actually shot down, all the evils which the statute was intended to remedy still existed in the parade in which the defendant took part. To hold that such a weapon is not a "firearm," within the meaning of the statute, would be to give too narrow and strict a construction to its words. It was originally a firearm which was effective for use. The fact that it was disabled for use did not change its name. It was for the court to determine whether the statute included the weapon which was produced and exhibited at the trial, and his instruction to the jury that it was a "fire-

arm," within the meaning of the statute, was right. *Williams v. State*, 61 Ga. 417, 34 Am. Rep. 102; *Atwood v. State*, 53 Ala. 508; *Bish. St. Crimes*, § 791.

Verdict of guilty to stand.

9. McGARRAY v. MURPHY.

(Supreme Court of Ohio, 1909. 80 Ohio St. 413, 88 N. E. 881, 17 Ann. Cas. 444.)

DAVIS, J. The defendant in error made application to the court of common pleas of Cuyahoga county for a writ of habeas corpus representing that he was unlawfully restrained of his liberty by the sheriff of that county upon the pretext that the relator had used insulting language to one Capt. Lock of the Ohio National Guard. The return indorsed on the writ disclosed that the sheriff held the relator under the following authority: "Cleveland, Ohio, October 27, 1908. To the sheriff of Cuyahoga county. Sir, This is to notify you that William C. Murphy has been sentenced to confinement in the county jail of Cuyahoga county for fifteen days, commencing at noon, October 27th. Frank E. Lock, Captain Fifth Infantry, O. N. G." Upon the hearing in the common pleas court, it appeared from the relator's own testimony that he was under 21 years of age when he enlisted; that he had served one year and a half without having applied for discharge on account of minority; that he was arraigned before the summary court officer of the regiment and charges read to him and he pleaded guilty thereto; that he was then detained at the armory until Capt. Lock came and told him that he was sentenced to serve 15 days in the jail, and he was then taken to the jail, where he was held until the time of the hearing on the application for a writ of habeas corpus. It also appeared from the testimony of the relator and of Capt. Lock that the relator was a private soldier in Company F of the Fifth Regiment of Infantry of the Ohio National Guard, of which company Frank E. Lock was the captain, and that the relator as such private had received money from the United States government and had signed government pay rolls. Upon the facts thus appearing, the court of common pleas found that Murphy was not unlawfully restrained of his liberty, and remanded him to the custody of the sheriff. Upon a petition in error filed the same day in the circuit court, that court reversed the judgment of the court of common pleas for error "in refusing to grant the prayer of the petition," and discharged the prisoner.

We think that it clearly appears from this record that Murphy is a soldier of "the organized militia" of the United States, in the National Guard of Ohio, as defined in the act of Congress approved January 21, 1903 (32 Stat. 775, c. 196 [U. S. Comp. St. Supp. 1907, p. 326]), entitled "An act to promote the efficiency of the militia, and for other purposes" as amended by the act of May 27, 1908 (35 Stat. 399, c. 204); and that as such soldier he was liable to trial by court-martial and punishment under the twentieth article of war of the United States, adopted in article 3, par. 14, of the Regulations of the Ohio National Guard, which reads as follows: "Any officer

or soldier who behaves himself with disrespect toward his commanding officer, shall be punished as a court-martial may direct."

It has not been made to appear in this record that there was anything illegal or irregular in the trial, conviction, or punishment of this soldier; and if there were, in the view which we take of the status of the defendant in error, we are not of the opinion that the civil courts of this state have any right to review the proceedings of a military court which has proceeded within its jurisdiction. It is true that objection was made that the sheriff was detaining the prisoner without the authority of a strictly formal and regular commitment; but it is provided in section 5729, Rev. St., that, "if the jurisdiction appear after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment or order." In the communication from Capt. Lock to the sheriff, which the latter produces as his authority for detaining the relator, it appears that the relator was sentenced, which could only be understood to have occurred after a trial and conviction, and it was long ago held by this court that "a habeas corpus cannot be used as a summary process to review or revise errors or irregularities in the sentence of a court of competent jurisdiction. Imprisonment under a sentence cannot be unlawful unless the sentence is an absolute nullity." *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55; *Ex parte Van Hagan*, 25 Ohio St. 426. Nor can it avail anything to the defendant in error that a sheriff is a civil officer and ordinarily acts in that capacity, and that, when receiving prisoners sentenced by civil courts, his authority ordinarily is evidenced by a formal commitment, because in this instance he was acting as the instrument of a military court and in such case a commitment is not necessary. In field service the offender is taken to the guardhouse without ceremony or preliminaries. In the absence of a military prison, he is delivered to a sheriff or jailer upon arrangement with the latter.

But inasmuch as it is beyond dispute that the relator, defendant in error, is a soldier of the Ohio National Guard and of "the organized militia" of the United States, that he was charged in a summary court-martial with a purely military offense and pleaded guilty thereto, and that he was sentenced therefor in accordance with the military regulations, there can be no doubt that the summary court had jurisdiction of the subject-matter as well as of the person of the offender. Sections 3057, 3058, 3064, Rev. St. When it appears that a military court has jurisdiction over the offense charged and that the offender is a person who is amenable to its jurisdiction, it is well settled that its proceedings cannot be reviewed collaterally upon habeas corpus. The consensus of the cases is very concisely stated by Brewer, J., in *Re Grimley*, 137 U. S. 150, 11 Sup. Ct. 54, 34 L. Ed. 636, as follows: "It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence. And, on the other hand, it is equally clear that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court martial; and that no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdic-

tion. That being established, the habeas corpus must be denied and the petitioner remanded. That wanting it must be sustained and the petitioner discharged." Many other cases hold to this view. We cite only a few of them. *Ex parte Mason*, 105 U. S. 696, 26 L. Ed. 1213; *In re Davison* (C. C.) 21 Fed. 618; *Barrett v. Hopkins* (C. C.) 7 Fed. 313, 2 McCrary, 129; *In re Crain* (C. C.) 84 Fed. 788.

The judgment of the circuit court is reversed, and that of the common pleas affirmed.

Reversed.

CREW, C. J., and SUMMERS, SPEAR, SHAUCK, and PRICE, JJ., concur.

10. BANK OF PHŒBUS v. BYRUM.

(Supreme Court of Appeals of Virginia, 1910. 110 Va. 708, 67 S. E. 349, 27 L. R. A. [N. S.] 436, 135 Am. St. Rep. 953.)

Error to Circuit Court, Elizabeth City County.

Action by the Bank of Phœbus against one Byrum. From a judgment quashing an attachment, plaintiff brings error. Reversed.

KEITH, P. The Bank of Phœbus brought an action of debt against Byrum in the circuit court of Elizabeth City county, upon a negotiable note for \$589, which was due and payable, and sued out an attachment and served the same upon the Merchants' National Bank of Hampton, which had in its possession money belonging to the defendant. The defendant moved the court to quash the attachment, on the sole ground that it was sued out on false suggestion; the defendant being a resident of the state of Virginia.

Byrum was born in North Carolina and resided there continuously until 1898, when he came to Fortress Monroe and enlisted as a soldier in the army of the United States, in which service he has continued until the present time. Upon this evidence, the court, being of opinion that the defendant was a resident of Virginia, sustained the motion to quash, abated the attachment, and that judgment is before us upon a writ of error.

The territory known as "Fortress Monroe" was, by act of the General Assembly of Virginia of 1820 and a deed made in pursuance of that act, ceded and conveyed to the United States. It was acquired by the United States for military purposes, and has been and is now held for such uses and purposes.

It is provided by the Code of this state (section 15a, par. 2) that: "Exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this state; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands."

The fact that process can or cannot be served upon a defendant is not the test of the right to issue an attachment against him as a non-resident.

In *Shinn on Attachments*, § 103, it is said: "Where one is in fact a nonresident, his property will be liable in a foreign attachment, not-

withstanding the fact that the defendant may be in the state at the time it is sued out. Nor will the allegation of nonresidence be defeated by the fact that the defendant is personally served. The effect of such personal service will, of course, be to give the court jurisdiction to enter a general judgment and issue an execution, not only against the property attached but generally against the defendant and all of his property." And to the same effect see *Clark v. Ward*, 12 Grat. (Va.) 440; *Long v. Ryan*, 30 Grat. (Va.) 721; *Didier v. Patterson*, 93 Va. 541, 25 S. E. 661.

The real question here is whether or not a person born and domiciled in North Carolina, who comes to Fortress Monroe for the purpose of enlisting in the army, enlists, and remains an enlisted soldier of the United States, thereby acquires a residence in this commonwealth so as to defeat the right of a creditor to issue an attachment against him. If the power to serve a process were the test, clearly the reservation made by the state would be sufficient to cover this case; but that reservation of right to serve a process has nothing to do with the personal status of the individual.

In the case of *U. S. v. Cornell*, 2 Mason, 60, Fed. Cas. No. 14,867, Mr. Justice Story said: "There is nothing incompatible with the exclusive sovereignty or jurisdiction of one state that it should permit another state in such cases to execute its process within its limits. And a cession of exclusive jurisdiction may well be made with a reservation of a right of this nature, which then operates only as a condition annexed to the cession, and as an agreement of the new sovereign to permit its free exercise as quod hoc, his own process. This is the light in which clauses of this nature (which are very frequent in grants made by the states to the United States) have been received by this court on various occasions, on which the subject has been heretofore brought before it for consideration, and it is the same light in which it has also been received by a very learned state court"—citing *Commonwealth v. Clary*, 8 Mass. 72.

In *Foley v. Shriver*, 81 Va. 573, the question was whether the National Home for Disabled Volunteer Soldiers was subject to the jurisdiction of the circuit court of Elizabeth City county, and this court said: "In this case, the state Legislature having given the required consent, and the United States having purchased the land in question, the United States have acquired, under the federal Constitution, exclusive jurisdiction over the ceded lands, and they are no longer a part of the state of Virginia, and are not subject to the jurisdiction of the state courts. Persons residing there are not citizens of Virginia: the property situated there is not subject to the control or disposal of any state court; and the circuit court of Elizabeth City county is without jurisdiction within said territory."

In *Jacobs on the Law of Domicile*, § 303, it is said: "Neither quasi national nor municipal domicile of a person is affected by his enlistment or acceptance of a commission in the military or war marine service of his country. He does not thereby lose the quasi national or municipal domicile which he had when he entered the service, nor does he acquire at the place where he serves."

In *Lyon v. Vance*, 46 W. Va. 781, 34 S. E. 761, where a resident of the state of West Virginia entered the volunteer service of the United States, and with his regiment went beyond the limits of the state, and remained for some time in such service, it was held that he did not thereby become a nonresident of the state, within the meaning of the attachment law; and, that being the only ground of attachment against him, a valid attachment could not on that ground be sued out against his property.

In *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264, the Supreme Court says: "When the title is acquired by purchase by consent of the Legislatures of the states, the federal jurisdiction is exclusive of all state authority. This follows from the declaration of the Constitution that Congress shall have 'like authority' over such places as it has over the district which is the seat of government; that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of Congress; and that no other authority can be exercised over them has been the uniform opinion of federal and state tribunals, and of the Attorneys General. The reservation, which has usually accompanied the consent of the states that civil and criminal process of the state courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them, but is admitted to prevent them from becoming an asylum for fugitives from justice."

For the foregoing reasons, we are of opinion that the defendant in error did not acquire a residence in the state of Virginia by reason of having enlisted in the army of the United States and resided as such enlisted soldier at Fortress Monroe; that, being a nonresident, his property was subject to attachment; and that the judgment of the circuit court must be reversed.

Reversed.

BUCHANAN, J., absent.

11. STATE v. PEAKE.

(Supreme Court of North Dakota, 1912. 22 N. D. 457, 135 N. W. 197, 40 L. R. A. [N. S.] 354.)

Appeal from District Court, Burleigh County; W. H. Winchester Judge.

Certiorari by the State, on the relation of Thomas H. Poole, against Amasa P. Peake, Adjutant General, to review a general court-martial. From a judgment in relator's favor, defendant appeals. Affirmed.

FISK, J. While fully realizing that we are in no manner responsible either for the facts or the law which must control in disposing of this appeal, the duty which has been assigned the writer of giving expression to the views of the court is not a pleasant one, owing to the nature of the litigation, and more especially in view of the fact that our conclusion does not coincide with the views entertained by the Chief Executive of the state, as well as by prominent officers of the National Guard who were instrumental in instituting and prosecuting

the proceeding before the general court-martial, hereafter mentioned, out of which proceeding this litigation arose. Although the views of these high officials of a co-ordinate branch of the state government are entitled in case of doubt to much respect and weight relative to the extent of the powers delegated to them by the Constitution and statutes, yet such views, when clearly erroneous, must be declared so by the courts, and the acts of such officials, when manifestly in excess of jurisdiction, must be adjudged null and void whenever their legality is properly challenged in court, for otherwise the court would not be discharging its constitutional duty.

The facts necessary to a full understanding of the questions involved are correctly stated in appellant's brief, and in substance are as follows: This cause comes to this court on appeal from a judgment of the district court of the Sixth judicial district, entered on the 8th day of January, 1911, which in effect vacates and annuls the findings and sentence of a general court-martial which found the respondent, Thomas H. Poole, guilty of having violated the Military Code of this state and dismissing him from the service of the National Guard of the state. The respondent was tried before a general court-martial on the 12th day of January, 1909. He was found guilty of having violated both the twenty-first and sixty-first Articles of War, and sentenced by the court "to be dismissed from the service of the National Guard of the state of North Dakota." This sentence was approved by the Governor of the state. On the 7th day of August, 1909, on application of respondent, a writ of certiorari was issued, directed to Amasa P. Peake, as Adjutant General of the state, requiring him to certify and transmit to the district court of the Sixth judicial district a true and full record of all the proceedings of said general court-martial and the orders of the Governor, and praying that all the said proceedings be declared null and void and that the respondent be restored to his rank of a Brigadier General (retired) in the North Dakota National Guard. The court made findings and an order for judgment, which adjudged and determined that "the order made and issued by Hon. John Burke, as Governor and Commander in Chief of the National Guard of the state of North Dakota, on the 12th day of January, 1909, directing and ordering that a general court-martial be convened to hear and try certain charges and specifications against the relator, Thomas H. Poole, be and the same is hereby held to be null and void and without jurisdiction. And said court-martial convened and held pursuant to said order, and all its proceedings and acts, sentence, and judgment are hereby set aside and annulled. And it is further adjudged, determined, and decreed that the order of the Honorable John Burke, as Governor and Commander in Chief, made March 1, 1909, approving the proceedings, findings, sentence, and judgment of said court-martial, and purporting to remove and discharge said Thomas H. Poole from the organized militia of this state, and depriving him of his rank as Brigadier General on the retired list, is hereby declared null and void and of no effect."

The assignments of error challenge the jurisdiction of the court below to inquire into the validity of the proceedings before the general court-martial or to enter the judgment appealed from. Notwithstand-

ing the statement to the contrary in appellant's additional memorandum brief filed herein, no question was raised in that court that certiorari is not an appropriate remedy, but appellant's contention there was merely as above stated. In such additional brief counsel assert that such question was squarely raised in the court below on the motion to quash the writ. In this they are clearly in error. In the first place, such motion and the ruling thereon are not properly before us, as no statement of the case was settled. *Mooney v. Donovan*, 9 N. D. 93, 81 N. W. 50. In the second place, conceding, for the sake of argument, that they are properly before us, such motion to quash did not raise such question. The grounds of the motion are, in substance, as follows: (1) It appears on the face of said writ that the general court-martial complained of was legally assembled, organized, and constituted; (2) that said Thomas H. Poole was at the time a member of the National Guard of the state of North Dakota; (3) that said court-martial had jurisdiction over the person of Thomas H. Poole; (4) that said court-martial had jurisdiction over the subject-matter; (5) that said court-martial, acting within its jurisdiction, rendered judgment finding the defendant guilty as charged in the specifications; (6) that his excellency, the Governor, as Commander in Chief of the National Guard, approved said judgment; and (7) that this court is without jurisdiction to inquire into, review, or question the proceedings of said court-martial or the orders of the Governor and Commander in Chief in relation thereto.

It is therefore clearly apparent from the above that no question as to the correctness of the remedy invoked was made in the court below, as each ground of the motion went to the merits, and consequently appellant is not in a position to raise such question for the first time in this court. But if we could brush aside these well-settled rules of practice, we would nevertheless be obliged to overrule appellant's contention, for it is entirely clear that certiorari is an appropriate writ to review the proceedings of such court-martial for the purpose of determining whether it exceeded its jurisdiction. While it is no doubt true that it was not a "court" within the meaning of sections 85 and 86 of our state Constitution, nor within the meaning of section 7810, R. C., it was a "tribunal" within the meaning of the statute aforesaid, and its acts may be inquired into through the use of such writ, not for the purpose of correcting any mere errors, which may have been committed by it, but solely for the purpose of determining whether such tribunal exceeded its jurisdiction. It would be strange, indeed, if this could not be done, for otherwise great injustice might be inflicted on a person by such a tribunal while acting wholly without jurisdiction, and yet such aggrieved person might have absolutely no redress. Our attention has been called by counsel to no authority sustaining appellant's contention. The case of *State v. Nuchols*, 18 N. D. 237, 119 N. W. 632, 20 L. R. A. (N. S.) 413, cited by appellant, is not in point. In that case we held, it is true, that a court-martial is not an inferior court within the meaning of section 86 of the Constitution, as it belongs to the executive and not to the judicial department of the state; but we also there said: "Of course, if it exceeds its jurisdiction or acts without jurisdiction, its judgments are nullities, and any person aggrieved

thereby may seek proper redress in the civil courts having jurisdiction, and such courts will furnish appropriate relief." See, in this connection, the valuable note to said case as reported in 20 L. R. A. (N. S.) 413, wherein the authorities are reviewed at length, and they will be found to support our views as above expressed. One of the leading cases is that of *People ex rel. Smith v. Hoffman*, 166 N. Y. 462, 60 N. E. 187, 54 L. R. A. 597, wherein that great court, speaking through Judge Vann, most thoroughly considered this point, which was the sole question before it, and reached the conclusion that certiorari will lie. The appellant's contention in the case at bar is there most effectually answered, and the reasoning and conclusion of the court meet with our full approval.

This brings us to the merits, which involve the question whether the general court-martial had any jurisdiction to try the relator for the alleged offenses charged against him and render its judgment and sentence dismissing him from the National Guard. If this question must be answered in the negative, it, of course, necessarily follows that such judgment, as well as the order made March 1, 1909, by the Governor as Commander in Chief, approving the findings and judgment of such general court-martial, and purporting to dismiss relator as an officer in the National Guard, are nullities, and he would still retain his rank in the Guard as before.

We will now notice some of the principal contentions of the respective parties. They are widely and radically at variance and involve numerous propositions of law; but we shall consider only those which we deem controlling and decisive of the appeal. Relator's chief contention is that he was not amenable to a court-martial at all, because he was not a militiaman in active service, and there was no war or public danger. In other words, he plants himself squarely on the constitutional guaranty found in section 8 of the state Constitution, and also in the fifth amendment to the federal Constitution. Section 8 reads: "Until otherwise provided by law, no person shall, for a felony, be proceeded against criminally, otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. * * *" He asserts that said sections clearly forbid prosecutions of militiamen for felonies by court-martial, except when such militiamen are in actual service in time of war or public danger, and that the charges on which he was thus convicted are felonies; also, that at the time of such trial and conviction there was no law in this state authorizing a court-martial for the trial of a person charged with any crime; that the Articles of War do not govern the militiamen except while in actual service.

It is needless to detail appellant's contentions. They are squarely opposed to those of the relator. We are compelled to uphold relator's contentions and will proceed to point out what we deem to be the basic fallacy in appellant's argument. His counsel apparently wholly ignore the radical and fundamental distinction between the militia of the state and the regular army and navy of the United States, and the laws governing each. Such distinction is perfectly clear and is recognized in both the federal and state Constitutions as well as in the statutes. Neither of such Constitutions forbids prosecutions for felonies

otherwise than by presentment or indictment in cases arising in the land and naval forces (army and navy) even in times of peace; but they each clearly forbid such prosecutions in cases arising in the militia, except when such militia is in actual service, in time of war or public danger. The regular army is at all times governed by the Articles of War, and its officers and soldiers are amenable to courts-martial for any violations thereof, as well in times of peace as in times of war. Not so, however, with the state militia. The latter is governed thereby only while in actual service in time of war or public danger or when expressly so provided by local state law. A moment's reflection will serve to demonstrate the wisdom of such distinction. As said by Judge Vaun, in *People v. Hoffman*, supra: "There is a wide distinction between the regular army of the nation and the militia of a state when not in the service of the nation, for discipline which is ample for the latter will not answer for the former. A member of the state militia belongs to civil life, has a civil avocation, and only occasionally engages in the exercise of arms. A member of the United States army, on the other hand, has no employment except that of a soldier, and arms constitute the business of his life. Hence more rigid rules and a higher state of discipline are required in the one case than in the other. Moreover, the state militia is organized by statutes of the state, and the Legislature, under the limitations of the Constitution, has power to regulate the entire subject, to invest boards of examination with such authority, and to give the civil courts such power to review as it sees fit."

As we understand the position of appellant's counsel, it is that the Articles of War govern and control our state militia in times of peace the same as they govern and control the regular army. The charges against the relator on which he was convicted by the court-martial are based on alleged violations of the Articles of War. It is perfectly manifest to our minds that such proceedings were a nullity for the obvious reason that our Legislature had not, in its wisdom, seen fit to thus ordain. The Military Code in force in this state at the time relator was tried and convicted, being chapter 21, Political Code 1905, expressly provided that "the militia while in active service shall be governed by the military law of the state, and the rules and Articles of War of the United States" (section 1717); but such Code will be searched in vain for any provision adopting the Articles of War for its government when not in active service, or, in other words, in time of peace, and such statute nowhere defines any military offenses punishable by court-martial or otherwise in time of peace. But appellant's counsel quote section 1752 of the Code, which pertains to the drill, discipline, and uniform of the National Guard, and say: "By what military code are the powers and duties to be measured of an officer in the National Guard of this state? The respondent concedes that there are no military regulations of the state. The Legislature having adopted the rules and articles that govern the armies of the United States have therefore said in the most solemn manner that the National Guard of this state shall be governed by the same rules and regulations. Therefore if the commanding officer of the company, whether in command or not, should commit a misdemeanor or a felony, he cer-

tainly could be tried by general court-martial under the laws of this state." Right here is, in our opinion, the basic fallacy in appellant's contention. Counsel wholly misinterpreted said statute. It deals merely with matters relating to drill, discipline, and uniforms, and it merely adopts the regulations of the army, Articles of War, and acts of Congress as authority and to govern in such matters in cases not provided by the laws of the state, etc. The word "discipline," as there used, means "system of drill"; "systematic training"; "training to act in accordance with established rules; accustoming to systematic and regular action." See Webster's New International Dictionary, and also 27 Cyc. 496. This is apparent, for if section 1752 be given the broad meaning contended for by appellant, it would conflict with, or at least render superfluous, section 1717, which provides that the militia while in active service shall be governed by the rules and Articles of War of the United States. Furthermore, to attribute to the Legislature such an intent would be absurd. No state in the Union has ever enacted such a law to our knowledge, nor could it be done in this state as to felonies without an amendment to the state Constitution, and we apprehend that the suggestion of such a thing as subjecting members of our state militia to trial by court-martial for felonies in time of peace would shock our citizens.

But counsel for appellant earnestly argue that, if this court should hold that it cannot be done, "the National Guard ought to disband and pile their uniforms and equipment in the public streets and set fire to them, because there would be no power whatsoever to control either officers or men, and there would be greater danger from men who could not be controlled in time of peace than there would be from men in time of war." We fear counsel are unduly alarmed. This is, so far as we are aware, the first and only time in the entire history of this state that a resort to a court-martial was deemed necessary or advisable. Furthermore, the remedy, if one is needed, lies with the Legislature, and no doubt will be furnished if applied for. In 1909 the Legislature of this state enacted a new and very comprehensive Military Code (chapter 165, Laws 1909); but it did not see fit, in its wisdom, to confer on a court-martial the power to try a militiaman for a felony in time of peace. It is, however, provided by such Military Code that certain by-laws, rules, and regulations may be adopted by associations therein authorized to be formed, also rules may be adopted by the Governor as Commander in Chief, and that for violations thereof enlisted men may be tried by court-martial and also expelled from the organization. Section 12 of such new Code expressly provides when the Articles of War shall be in force as governing the militia, and it is a significant fact that such new statute limits the times in which they shall apply to the occasions when such militia is on duty pursuant to the orders of the Governor, or when ordered to assemble for duty in time of war, insurrection, invasion, public danger, or to aid the civil authorities.

In many of the states the Legislatures have seen fit to provide for the enforcement of discipline in the organized militia by fine and imprisonment imposed by courts-martial for infractions of rules and regulations, even in times of peace. The right so to do is undoubted, but

it was not exercised in this state until the new Military Code of 1909 was adopted. See, in this connection, 27 Cyc. 496, from which we quote: "The laws of nearly all the states have been revised with a view of conforming the organization and discipline of the organized militia to that of the regular army, and violations of military laws or regulations are now generally dealt with by military courts within the scope of their jurisdiction as defined by the state laws"—citing *State v. Wagener*, 74 Minn. 518, 77 N. W. 424, 42 L. R. A. 749, 73 Am. St. Rep. 369. The case of *State v. Wagener*, *supra*, seems to be a leading authority, and we commend the opinion of Judge Mitchell as a clear and sound statement of the law. The opinion recognizes the right of the state Legislature, within constitutional restrictions, to provide certain rules and regulations for the government of the organized militia, and, as disciplinary measures, to authorize courts-martial to impose fines and imprisonment for violations thereof, and it is therein stated that in many if not most, of the states, this has been done.

It goes without saying that courts-martial are courts of special and limited jurisdiction, and that they possess no powers not expressly conferred on them. 27 Cyc. 498; 22 Opinions of U. S. Attys. Gen. 137; *Dynes v. Hoover*, 20 How. 65, 15 L. Ed. 838; *Deming v. McClaghry*, 113 Fed. 639, 51 C. C. A. 349.

That the terms "actual service" and "active service," as used in the Constitution and Military Code, mean service in time of war or public danger, etc., is clear. It is likewise clear that the words "when in actual service in time of war or public danger," in section 8 of our Constitution, apply to the militia only. *Johnson v. Sayre*, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. Ed. 914. That the words "actual service" and "active service" are used in such restrictive sense in our Military Code is entirely clear from a reading of sections 1716, 1761, 1762, 1774. See, also, *State v. Josephson*, 120 La. 433, 45 South. 381, and *Bryant v. Brown*, 98 Ky. 211, 32 S. W. 741. It must necessarily follow, therefore, that, being in time of peace, the Articles of War in no manner governed the militiamen, and consequently Brigadier General Poole (retired) could not be tried for alleged violations thereof.

Entertaining the above views, it becomes unnecessary to notice the other points in controversy.

We conclude, therefore, that the judgment appealed from, in so far as it adjudges that the orders therein enumerated, as well as the acts and judgment of such court-martial, are null and void, must be affirmed.

SPALDING, C. J. I concur fully in the opinion of my Associate covered by paragraph 1 of the syllabus; and while I concur in the opinion that the court-martial in question was without jurisdiction, I reach my conclusion by a method differing from that pursued by my Associates, and cannot concur in all that is said in the majority opinion. I prefer to confine my conclusions as to the jurisdiction of the court-martial to the case before us, viz., its jurisdiction over a retired officer not on duty of any kind. The relator had been retired by operation of law, under provisions of the Code of this state. A retired officer of our militia bears a relation to the organized militia differing materially from that borne by a retired army officer to the regular

army. The latter is made, by statute, subject to trial by court-martial. Rev. St. U. S. § 1256 (U. S. Comp. St. 1901, p. 888). A retired militiaman is not made subject to trial by such court, and the character of his position as fixed by our Code renders it inappropriate that he should be subject to court-martial, at least when not on detail by order of the Governor. Relator was not on any kind of duty, and the decision need go no farther than to cover the case of such an officer. I rest my concurrence on the ground that an officer retired by operation of law is not subject to be tried by court-martial when not on duty under detail by order of the Governor. I express no opinion farther than this.

On Petition for Rehearing.

FISK, J. We have carefully considered the petition for a rehearing filed by appellant and find nothing therein to cause us to change our views as above expressed.

In denying such petition we deem it advisable to briefly notice some of the principal contentions made in such petition. It is manifest that appellant's counsel are laboring under a misapprehension regarding the court's holding, for they start the petition with the following assertion: "The decision of the court proceeds upon the theory that the militia of a state can only be subject to trial by court-martial when they are in the actual service of state or nation." This is very far from the fact, for the exact contrary is true. We held that the Articles of War do not govern the state militia in times of peace, for the Legislature has not thus ordained, and consequently the officers and members of such militia are not subject to court-martial in time of peace for alleged violations of such Articles of War. But we distinctly said that the power of the Legislature to provide for the enforcement of discipline in the organized militia by fine and imprisonment imposed by courts-martial for infractions of rules and regulations, even in times of peace, is undoubted.

Counsel in their petition again call our attention to sections 188 to 193 of our state Constitution and insist that we have overlooked the same. In this they are again mistaken. There is no room for doubt that "all able-bodied male persons residing in the state between the ages of 18 and 45 years," with certain exceptions, constitute the militia of the state, nor is there any room for doubt that the organized militia or National Guard constitutes the "active militia." But the terms "active militia" and "the militia when in actual service in time of war or public danger" are entirely distinct and of different meaning, and the basic fallacy in counsel's contention apparently is their failure to distinguish the difference between these terms. Section 8 of our Constitution, which provides that no person shall for a felony be proceeded against criminally otherwise than by indictment, does not except from its provisions the active militia in time of peace, but it excepts "the militia when in actual service in time of war or public danger." No doubt the framers of the Constitution contemplated that the Legislature would prescribe rules and regulations for the government of the organized or active militia in time of peace as well as when called into active service for the state in time of public danger, etc., for section 192 clearly contemplates that there may be trials by courts-

martial; but it is perfectly manifest that until such time as the Legislature has made provision therefor no such trials could be had. Our attention is called to section 1753, R. C., which makes certain acts a misdemeanor and concludes with the statement "and upon conviction shall be fined in a sum not less than \$50.00 nor more than \$100.00, or may be cashiered." This section is somewhat vague; but, conceding all that is claimed for it by appellant's counsel, the most that can be said is that in cases falling within the provisions of said section members of the militia may be court-martialed, but this does not aid appellant in this case, for respondent is not charged with a violation of said section, but is, as we have seen, charged with a violation of the twenty-first and sixty-first Articles of War.

Our attention is called in the petition to the fact that in three instances during statehood prosecutions by court-martial have taken place in this state; but this fact is in no manner controlling, nor does it operate in the least to change our views of the law as above expressed.

Counsel evidently do not understand the decision in *State v. Nuchols*, for they criticise the special concurring opinion of the Chief Justice in the case at bar and assert that it is contrary to the holding in that case. In this, counsel are grievously in error. We did not hold in the *Nuchols* Case that the court-martial had jurisdiction, but we held merely that no power has been conferred by the Constitution on the Supreme Court to issue the writ of prohibition in a case like that, and that the relators therein should seek relief, if at all, in the proper court. See opinion in 18 N. D. 233, 119 N. W. 632, 20 L. R. A. (N. S.) 413.

The petition is denied.

(b) *Martial Law—Ordinary and Extraordinary Jurisdiction*

1. Ex parte MILLIGAN.

(Supreme Court of the United States, 1866. 4 Wall. 2, 18 L. Ed. 281.)

This case came before the court on certificate of division from the Circuit Court for the District of Indiana on a petition for discharge from unlawful imprisonment. The act of March 3, 1863 (12 U. S. St. at Large, 755), authorized the President to suspend the writ of habeas corpus throughout the United States during the Civil War, and required that lists of prisoners who were citizens of States wherein the administration of law by the federal courts had been unimpaired, and who were held by the United States otherwise than as prisoners of war, should be furnished to the judges of the federal courts, and also that, in case a grand jury of such a court should fail to indict a person on the list, the judge should make an order that such prisoner should be brought before the court to be discharged on entering into recognizance, if required, for good behavior or for future appearance. The President by proclamation, September 15, 1863 (13 U. S. St. at Large, 734), recited this statute and suspended the privilege of the writ in cases where persons were held by the United States as prisoners of war, spies, aiders or abettors of the enemy, or for resisting a draft, or for

any offence against the military or naval service. On October 5, 1864, Milligan, a citizen of Indiana, was arrested in that State by order of the military commandant of the District of Indiana. On October 21, 1864, he was brought before a military commission convoked by the commandant. He was found guilty of conspiring against the government of the United States, affording aid and comfort to the enemy, inciting insurrection, and violating the laws of war. He was sentenced to death, and the sentence was approved by President Johnson, the execution to occur on May 19, 1865. On January 2, 1865, after the proceedings of the military commission were at an end, the Circuit Court met in Indiana, and impaneled a grand jury; and on January 27, 1865, the court adjourned, neither that grand jury nor any other having found an indictment against Milligan. On May 10, 1865, Milligan filed his petition, stating the facts and praying that he be brought before the court in accordance with the act of Congress, and that he be either turned over to the proper civil tribunal or discharged from custody. The opinions of the judges were opposed on the following three questions certified:

1st. On the facts stated, ought a writ of habeas corpus to be issued?

2d. On the facts stated, ought Milligan to be discharged from custody?

3d. Whether, on the facts stated, the military commission had jurisdiction legally to try and sentence Milligan. * * *

DAVIS, J., delivered the opinion of the court. * * *

The controlling question in the case is this: Upon the facts stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it jurisdiction, legally, to try and sentence him? Milligan, not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission organized under the direction of the military commander of the military district of Indiana. Had this tribunal the legal power and authority to try and punish this man?

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birth-right of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents

inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct, to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says, "That the trial of all crimes, except in case of impeachment, shall be by jury;" and in the fourth, fifth, and sixth articles of the amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure; and directs that a judicial warrant shall not issue "without proof of probable cause supported by oath or affirmation." The fifth declares "that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor be deprived of life, liberty, or property, without due process of law." And the sixth guarantees the right of trial by jury, in such manner and with such regulations that with upright judges, impartial juries, and an able bar, the innocent will be saved and the guilty punished. It is in these words; "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial trial of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, [and] to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified. * * *

Have any of the rights guaranteed by the Constitution been violated in the case of Milligan? and if so, what are they?

Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it "in one supreme court and such inferior courts as the Congress may from time to time ordain and establish," and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is "no unwritten criminal code to which resort can be had as a source of jurisdiction."

But it is said that the jurisdiction is complete under the "laws and usages of war."

It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

Why was he not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offences charged, provided for their punishment, and directed that court to hear and determine them. And soon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business, and adjourned. It needed no bayonets to protect it, and required no military aid to execute its judgments. It was held in a state, eminently distinguished for patriotism, by judges commissioned during the Rebellion, who were provided with juries, upright, intelligent, and selected by a marshal appointed by the President. The government had no right to conclude that Milligan, if guilty, would not receive in that court merited punishment; for its records disclose that it was constantly engaged in the trial of similar offences, and was never interrupted in its administration of criminal justice. If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he "conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection," the law said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended.

Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning, this right—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service.

The sixth amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, "excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger;" and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.

The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. All other persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of state or political necessity. When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this; that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regu-

lated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power"—the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.

This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus.

It is essential to the safety of every government that, in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of habeas corpus. In every war, there are men of previously good character, wicked enough to counsel their fellow-citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of habeas corpus. The Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they limited the suspension to one great right, and left the rest to remain forever inviolable. But, it is insisted that the safe-

ty of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.

It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late Rebellion, required that the loyal states should be placed within the limits of certain military districts and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theatre of military operations; and, as in this case, Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.

It is difficult to see how the safety of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this man than a military tribunal composed of gentlemen not trained to the profession of the law.

It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule

may become a necessity in one state, when, in another, it would be "mere lawless violence." * * *

From the first year of the reign of Edward the Third, when the Parliament of England reversed the attainder of the Earl of Lancaster, because he could have been tried by the courts of the realm, and declared, "that in time of peace no man ought to be adjudged to death for treason or any other offense without being arraigned and held to answer; and that regularly when the king's courts are open it is a time of peace in judgment of law," down to the present day, martial law, as claimed in this case, has been condemned by all respectable English jurists as contrary to the fundamental laws of the land, and subversive of the liberty of the subject. * * *

It is contended, that *Luther v. Borden*, decided by this court, is an authority for the claim of martial law advanced in this case. The decision is misapprehended. That case grew out of the attempt in Rhode Island to supersede the old colonial government by a revolutionary proceeding. Rhode Island, until that period, had no other form of local government than the charter granted by King Charles II, in 1663; and as that limited the right of suffrage, and did not provide for its own amendment, many citizens became dissatisfied, because the legislature would not afford the relief in their power; and without the authority of law, formed a new and independent constitution, and proceeded to assert its authority by force of arms. The old government resisted this; and as the rebellion was formidable, called out the militia to subdue it, and passed an act declaring martial law. Borden, in the military service of the old government, broke open the house of Luther, who supported the new, in order to arrest him. Luther brought suit against Borden; and the question was, whether, under the constitution and laws of the state, Borden was justified. This court held that a state "may use its military power to put down an armed insurrection too strong to be controlled by the civil authority:" and, if the legislature of Rhode Island thought the peril so great as to require the use of its military forces and the declaration of martial law, there was no ground on which this court could question its authority; and as Borden acted under military orders of the charter government, which had been recognized by the political power of the country, and was upheld by the state judiciary, he was justified in breaking into and entering Luther's house. This is the extent of the decision. There was no question in issue about the power of declaring martial law under the Federal Constitution, and the court did not consider it necessary even to inquire "to what extent nor under what circumstances that power may be exercised by a state." * * *

To the third question, then, on which the judges below were opposed in opinion, an answer in the negative must be returned. * * *
The two remaining questions in this case must be answered in the affirmative. * * *

CHASE, C. J., delivered the following opinion:

Four members of the court, concurring with their Brethren in the order heretofore made in this cause, but unable to concur in some important particulars with the opinion which has just been read, think

it their duty to make a separate statement of their views of the whole case. * * *

The first two questions certified must receive affirmative answers, and the last a negative. We do not doubt that the positive provisions of the act of Congress require such answers. We do not think it necessary to look beyond these provisions. In them we find sufficient and controlling reasons for our conclusions.

But the opinion which has just been read goes further; and as we understand it, asserts not only that the military commission held in Indiana was not authorized by Congress, but that it was not in the power of Congress to authorize it; from which it may be thought to follow that Congress has no power to indemnify the officers who composed the commission against liability in civil courts for acting as members of it.

We cannot agree to this.

We agree in the proposition that no department of the government of the United States—neither President, nor Congress, nor the courts—possesses any power not given by the Constitution. * * *

We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana. * * *

The Constitution itself provides for military government as well as for civil government. And we do not understand it to be claimed that the civil safeguards of the constitution have application in cases within the proper sphere of the former.

What, then, is that proper sphere? Congress has power to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; and to provide for governing such part of the militia as may be in the service of the United States. * * *

But we do not put our opinion, that Congress might authorize such a military commission as was held in Indiana, upon the power to provide for the government of the national forces.

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaign, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the

trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.

We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists.

Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress, to determine in what States or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety. * * *

We have confined ourselves to the question of power. It was for Congress to determine the question of expediency. And Congress did determine it. That body did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited them. * * *

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within States or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of States maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under "military law," and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as "military government," superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated "martial law" proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces.

We have no apprehension that this power, under our American system of government, in which all official authority is derived from the people, and exercised under direct responsibility to the people, is more likely to be abused than the power to regulate commerce, or the power to borrow money. And we are unwilling to give our assent by silence to expressions of opinion which seem to us calculated, though not intended, to cripple the constitutional powers of the gov-

ernment, and to augment the public dangers in times of invasion and rebellion.

Mr. Justice WAYNE, Mr. Justice SWAYNE, and Mr. Justice MILLER, concur with me in these views.

2. CRANDALL v. NEVADA.

(Supreme Court of the United States, 1867. 6 Wall. 35, 18 L. Ed. 745.)

Error to the Supreme Court of Nevada.

In 1865, the legislature of Nevada enacted that "there shall be levied and collected a capitation tax of one dollar upon every person leaving the State by any railroad, stage coach, or other vehicle engaged or employed in the business of transporting passengers for hire," and that the proprietors, owners, and corporations so engaged should pay the said tax of one dollar for each and every person so conveyed or transported from the State. For the purpose of collecting the tax, another section required from persons engaged in such business, or their agents, a report every month, under oath, of the number of passengers so transported, and the payment of the tax to the sheriff or other proper officer.

With the statute in existence, Crandall, who was the agent of a stage company engaged in carrying passengers through the State of Nevada, was arrested for refusing to report the number of passengers that had been carried by the coaches of his company, and for refusing to pay the tax of one dollar imposed on each passenger by the law of that State. He pleaded that the law of the State under which he was prosecuted was void, because it was in conflict with the Constitution of the United States; and his plea being overruled, the case came into the Supreme Court of the State. That court—considering that the tax laid was not an impost on "exports," nor an interference with the power of Congress "to regulate commerce among the several States"—decided against the right thus set up under the Federal Constitution.

Its judgment was now here for review. * * *

Mr. Justice MILLER delivered the opinion of the court. * * *

The people of these United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capital established by law, where its principal operations are conducted. Here sits its legislature, composed of senators and representatives, from the States and from the people of the States. Here resides the President, directing through thousands of agents, the execution of the laws over all this vast country. Here is the seat of the supreme judicial power of the nation, to which all its citizens have a right to resort to claim justice at its hands. Here are the great executive departments, administering the offices of the mails, of the public lands, of the collection and distribution of the public revenues, and of our foreign relations. These are all established and conducted under the admitted powers of the Federal government. That government has a right to call to this point any or all of its citizens to aid in its service, as members

of, the Congress, of the courts, of the executive departments, and to fill all its other offices; and this right cannot be made to depend upon the pleasure of a State over whose territory they must pass to reach the point where these services must be rendered. The government, also, has its offices of secondary importance in all other parts of the country. On the sea-coasts and on the rivers it has its ports of entry. In the interior it has its land offices, its revenue offices, and its sub-treasuries. In all these it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established.

The Federal power has a right to declare and prosecute wars, and, as a necessary incident, to raise and transport troops through and over the territory of any State of the Union.

If this right is dependent in any sense, however limited, upon the pleasure of a State, the government itself may be overthrown by an obstruction to its exercise. Much the largest part of the transportation of troops during the late rebellion was by railroads, and largely through States whose people were hostile to the Union. If the tax levied by Nevada on railroad passengers had been the law of Tennessee, enlarged to meet the wishes of her people, the treasury of the United States could not have paid the tax necessary to enable its armies to pass through her territory.

3. KETCHUM v. BUCKLEY.

(Supreme Court of the United States, 1878. 99 U. S. 188, 25 L. Ed. 473.)

Error to the Supreme Court of the State of Alabama.

In accordance with a special statute of Alabama, authorizing the appointment of a general administrator and general guardian for Mobile County, and for other purposes, approved Dec. 14, 1859, Wesley W. McGuire having been duly appointed to that office for the term of four years, he, March 7, 1864, made and delivered to the probate judge of the county his bond, in the penal sum of \$150,000, conditioned according to law, with Ketchum and others as his sureties thereon. Letters of administration were granted to him Sept. 21, 1865, upon the estate of William Buckley, deceased, by the Probate Court of said county, by virtue whereof he administered upon the estate. In May, 1869, in answer to a citation served upon him at the instance of the heirs of Buckley, he made a final settlement of his administration of the estate, and decrees were entered against him for the sums due to each of them respectively. Executions were issued on the decrees, and returned "no property found." George W. Buckley, one of said heirs, thereupon brought suit in the Circuit Court of Mobile County for the sum due to him by said decree, alleging that for the devastavit of the assets of the deceased, committed by the said McGuire, he and the other defendants, his sureties, were liable on the bond.

McGuire died after the commencement of this suit. His sureties set up that at the time of his appointment Alabama, as one of the so-called Confederate States, was at open war with the United States, but that before June 20, 1865, the Confederate government was subdued, the insurrectionary government of the State overthrown, and her entire people under martial law; that the President, in his proclamation of June 21, 1865 (13 Stat. 767), declared that the rebellion had "deprived the people of the State of Alabama of all civil government;" that he appointed Lewis E. Parsons governor, and authorized him to organize civil government in the State; that Parsons, in pursuance of the proclamation, and by virtue of the authority thereby conferred, called a convention of the people to be elected as therein prescribed to meet at Montgomery, to inaugurate civil government in the State; that he retained in office by name all justices of the peace and certain other officers, but declared that sheriffs and judges of the Probate Court were only retained until others should be appointed upon application of the people of the respective counties, but he authorized them to continue to discharge the duties of their respective offices upon taking the oath of fidelity to the United States; that George W. Bond had been elected probate judge of that county in May, 1861, for the term of six years, and was in office when the insurrectionary State government was overthrown; that said Parsons appointed said Bond to the office of probate judge; that the office of said McGuire as general administrator and general guardian had, by reason of the premises, ceased before the letters of administration were granted to him on the estate of said Buckley; that he was not named in the proclamation as one of the officers retained; that the grant of the letters to him was therefore void; and that his sureties were not liable for his administration of said estate.

The Circuit Court held, on demurrer, the defence to be insufficient to bar the suit. Judgment was rendered for the plaintiff, and it having been affirmed by the Supreme Court, the defendants sued out this writ of error.

Mr. Chief Justice WAITE delivered the opinion of the court.

We are not willing to hear an argument on the only possible Federal question presented by this case. It is now settled law in this court that during the late civil war "the same general form of government, the same general law for the administration of justice and the protection of private rights, which had existed in the States prior to the rebellion, remained during its continuance and afterwards. As far as the acts of the States did not impair or tend to impair the supremacy of the national authority, or the just rights of the citizens, under the Constitution, they are in general to be treated as valid and binding." *Williams v. Bruffy*, 96 U. S. 176, 24 L. Ed. 716; *Horn v. Lockhart et al.*, 17 Wall. 570, 21 L. Ed. 657; *Sprott v. United States*, 20 Wall. 459, 22 L. Ed. 371; *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227. The appointment by the President of a military governor for the State at the close of hostilities did not of itself change the general laws then in force for the settlement of the estates of deceased persons, and did not remove from office those

who were at the time charged by law with public duties in that behalf. It is not alleged that the governor after his appointment undertook by any positive act to remove McGuire from the position he occupied as general administrator, or that McGuire himself at any time ceased to perform the duties of his office by reason of what was done by the President or others towards the restoration of the State to its political rights under the Constitution of the United States. From all that appears in the record, he continued to act during the whole of his term as general administrator of the county, notwithstanding the changes that were going on in the other departments of the State government. Under these circumstances, it is so clear that the judgment of the court below was right, that we grant the motion to affirm.

Judgment affirmed.

4. STATE v. BROWN.

(Supreme Court of Appeals of West Virginia, 1912. 71 W. Va. 519, 77 S. E. 243, 45 L. R. A. [N. S.] 996, Ann. Cas. 1914C, 1.)

Habeas corpus by the State on relation of L. A. Mays, and on relation of F. S. Nance, to secure relator's release from custody of M. L. Brown, Warden of the State Penitentiary. Writs denied.

POFFENBARGER, J. L. A. Mays and S. F. Nance, in the custody of M. L. Brown, warden of the penitentiary of this state, under sentences of a military commission, appointed by the Governor, to sit in a territory corresponding in area and boundaries with the magisterial district of Cabin creek, in the county of Kanawha, in which the said Governor had declared a state of war to exist, by proclamation duly issued and published, seek discharges and liberation upon writs of habeas corpus duly issued by this court. Upon these writs, lack of authority in the Governor to institute, in cases of insurrection, invasion, and riot, martial law is denied in argument. A further contention is that his power to do so extends only to the inauguration or establishment of a limited or qualified form of such law, subordinate to the civil jurisdiction and power to a certain extent; and certain provisions of the state Constitution are relied upon as working this restraint upon the executive power, among them the provision of section 4 of article 3, saying, "The privilege of the writ of habeas corpus shall not be suspended," and the provision of section 12 of the same article saying, "The military shall be subordinate to the civil power; and no citizen, unless engaged in the military service of the state, shall be tried or punished by any military court, for any offense that is cognizable by the civil courts of the state." A minor question is whether offenses committed immediately before the proclamation of martial law, but connected with the insurrection and operative therein, may be punished by a military commission, acting within the period of martial occupation and rule.

All agree as to the character and scope of martial law, unrestrained by constitutional or other limitations. The will of the military chief, in this instance the Governor of the state, acting as command-

er in chief of the army, is, subject to slight limitations, the law of the military zone or theater of war. It is sometimes spoken of as a substitute for the civil law. It is said, also, that the proclamation of martial law ousts or suspends the civil jurisdictions. These expressions are hardly accurate. The invasion or insurrection sets aside, suspends, and nullifies the actual operation of the Constitution and laws. The guaranties of the Constitution, as well as the common law and statutes, and the functions and powers of the courts and officers, become inoperative by virtue of the disturbance. The proclamation of martial law simply recognizes the status or condition of things resulting from the invasion or insurrection, and declares it. In sending the army into such territory to occupy it and execute the will of the military chief for the time being, as a means of restoring peace and order, the executive merely adopts a method of restoring and making effective the Constitution and laws within that territory, in obedience to his sworn duty to support the Constitution, and execute the laws.

This power is a necessary incident of sovereignty. It is necessary to the preservation of the state. Subject to the jurisdiction and powers of the federal government, as delegated or surrendered up by the provisions of the federal Constitution, this state is sovereign and has the powers of a sovereign state. Like all others, it must have the power to preserve itself. Where that power resides, and how it is to be exercised, are questions about which there has been some difference of opinion among jurists and statesmen. Whether the executive, without legislative authority, may exercise it need not be discussed. Section 92 of chapter 18 of the Code confers upon the Governor authority to declare a state of war in towns, cities, districts, and counties in which there are disturbances by invasion, insurrection, rebellion, or riot. Moreover, section 12 of article 7 of the Constitution itself seems to confer such authority upon the Governor, saying he "may call out" the military forces "to execute the laws, suppress insurrection, and repel invasion." Hence we may say the inauguration of martial law in any portion of this state, by proclamation of the Governor, has both constitutional and legislative sanction in express terms.

The provisions against the suspension of the writ of habeas corpus and trial of citizens, by military courts, for offenses cognizable by the civil courts cannot, in the nature of things, be actually operative in any section in which the Constitution itself and the functions of the courts have been ousted, set aside, or obstructed in their operation by an invasion, insurrection, rebellion, or riot. In such cases, the constitutional guaranties of life, liberty, and property have ceased to be operative and efficacious. The lives, liberty, and property of the people are at the mercy of the invading, insurrectionary, rebellious, or riotous element in control. Their will and desires, not the Constitution and laws, rule and govern. There is no court with power to grant or enforce the writ of habeas corpus within the limits of such territory. There is no court in which a citizen can be tried, nor any whose process can be made effective for any purpose. No doubt the Constitution and laws of the state are theoretically or potentially operative; but they are certainly not in actual and ef-

fective operation. The exercise of the military power, disregarding, for the time being, the constitutional provisions relied upon, is obviously necessary to the restoration of the effectiveness of all the provisions of the Constitution, including those which are said to limit and restrain that power.

To ascertain the extent and purpose of the incorporation of these restrictive provisions of the Constitution, they must be read in the light of principles developed by governmental experience in all ages and countries, and universally recognized at the date of the adoption of the Constitution, and not expressly abolished or precluded from operation by any terms found in the instrument. In the interpretation of contracts, statutes, and constitutional provisions, words are often limited and restrained to a scope and effect somewhat narrower than their literal import, upon a presumption against intent to interfere with, or innovate upon, well-established and generally recognized rules and principles of public policy not expressly abolished. *Railway Co. v. Conley & Avis*, 67 W. Va. 129, 165, 67 S. E. 613; *Reeves v. Ross*, 62 W. Va. 7, 57 S. E. 284; *Brown v. Gates*, 15 W. Va. 131; *Cope v. Doherty*, 2 Deg. & J. 614; *State ex rel. Dillon v. County Court*, 60 W. Va. 339, 55 S. E. 382. Nothing can be higher in character or more indispensable than this power of self-preservation. The experience of all civilization has demonstrated its necessity as an incident of sovereignty. In the organization of the state, its citizens likely did not intend to omit or dispense with a power vital to its very existence or the maintenance and efficiency of its powers, under circumstances which inevitably arise in the life of every state. Hence there is strong ground for a presumption in favor of the retention of the power in question, which finds support in other constitutional provisions, authorizing the maintenance of a military organization, and the use of it by the executive in the repulsion of invasion and suppression of insurrections and riots. Article 7, § 12. No rebuttal of the presumption nor abolition of this sovereign power is found in any express terms of the Constitution.

The guaranties of supremacy of the civil law, trial by the civil courts, and the operation of the writ of habeas corpus should be read and interpreted so as to harmonize with the retention in the executive and legislative departments of power necessary to maintain the existence of such guaranties themselves. It is reasonable and logical. Otherwise the whole scheme of government may fail. So interpreted, they have wide scope and accomplish their obvious purpose. The attempt to extend them further would be futile and result in their own destruction. The interruption is of short duration. It is only while military government is used as an instrument of warfare that the commander's will is law. *New Orleans v. Steamship Co.*, 20 Wall. 387, 22 L. Ed. 354; *Ex parte Milligan*, 4 Wall. 2, 127, 18 L. Ed. 281. That a military occupation of a territory, in a state of peace and order, differs radically from the prosecution of a war in the same territory is well established. In *Ex parte Milligan*, cited in the former case, the military is subordinate to the civil power, no matter whether the occupancy under tranquil condition precedes or follows the military operations. Martial law is operative only in such portions of the country as are actually in a state of war, and

continues only until pacification. Ordinarily the entire country is in a state of peace, and, on extraordinary occasions calling for military operations, only small portions thereof become theaters of actual war. In these disturbed areas, the paralyzed civil authority can neither enforce nor suspend the writ of habeas corpus, nor try citizens for offenses, nor sustain a relation of either supremacy or subordination to the military power, for in a practical sense it has ceased. But, in all the undisturbed, peaceable, and orderly sections, the constitutional guaranties are in actual operation and cannot be set aside. *Ex parte Milligan*, cited. In most, if not all, of the instances in which the civil courts have treated sentences of military commissions as void, the commissions acted, and the sentences were pronounced, in tranquil territory, not covered by any proclamation of martial law, in which there was no actual war, and in which the Constitution and laws were in full and unobstructed operation. An insurrection in a given portion of a state, or an invasion thereof by a foreign force, does not produce a state of war outside of the disturbed area. A nation may be at war with a foreign power, and yet have no occasion to institute martial law anywhere within its own boundaries, as in the case of the United States in the war with Spain. So, during the Civil War, there were vast areas and whole states in which there was no actual war.

It seems to be conceded that, if the Governor has the power to declare a state of war, his action in doing so is not reviewable by the courts. Of the correctness of this view, we have no doubt. The function belongs to the executive and legislative departments of the government, and is beyond the jurisdiction and powers of the courts. There is room for speculation, of course, as to the consequences of an arbitrary exercise of this high sovereign power; but the people, in the adoption of their Constitution, may well be supposed to have proceeded upon a well-grounded presumption against any such action, and assumed that the evil likely to flow from an attempt to hamper and restrain the sovereign power in this respect might largely outweigh such advantages as could be obtained therefrom. We are not to be understood as saying there would be a lack of remedy in such case. The sovereign power rests in the people, and may be exerted through the Legislature to the extent of the impeachment and removal from office of a Governor for acts of usurpation and other abuses of power.

Power to establish a military commission for the punishment of offenses committed within the military zone is challenged in argument; but we think such a commission is a recognized and necessary incident and instrumentality of martial government. A mere power of detention of offenders may be wholly inadequate to the exigencies and effectiveness of such government. How long an insurrection or a war may last depends upon its character. Such insurrections as are likely to occur in a state like this are mild and of short duration. But no man can foresee and foretell the possibilities, and a government must be strong enough to cope with great insurrections and rebellions, as well as mild ones.

That the courts of Kanawha county sit within the limits of that county and outside of the military zone does not preclude the exer-

cise of the powers here recognized as vested in the executive of the state. These petitioners were arrested within the limits of the martial zone. There the process of the courts did not and could not run during the period of military occupation, and presumptively the state of affairs in that district, at the time of the military occupation and immediately before, was such as to preclude the free course and effectiveness of the civil law and the process of the court, however effective they may have been in other sections of Kanawha county. The Constitution and laws themselves admit the obvious inadequacy and insufficiency of ordinary process and penalties, in cases of insurrection, by authorizing military suppression thereof. Participants therein, arrested and committed to the civil authorities, could easily find means of delaying trial, and, liberated on bail, return to the insurrectionary camp and continue to render aid and give encouragement by unlawful acts; and demonstration of their ability to do so would itself contribute to the maintenance of the uprising. The civil tribunals, officers, and processes are designed for vindication of rights and redress of wrongs in times of peace. They are wholly inadequate to the exigencies of a state of war, incident to an invasion or insurrection. So the Legislature evidently regards them, since it expressly authorizes the Governor, "in his discretion," to "declare a state of war in towns, cities, districts, and counties." He is not required, by any principle of international or martial law, the Constitution, or statute to institute it, when proper by counties. On the contrary, the statute authorizes it as to a town, a city, or a district, and he is not limited to towns, cities, and districts in which the courts sit in times of peace, nor forbidden to put a town, city, or district of a county under martial law rule by the sitting of courts elsewhere in the county. Section 2 of chapter 17 of the Virginia Code of 1860 was the same in principle, authorizing the Governor to call forth the militia to suppress combinations for dismembering the state or establishing a separate government in any part of it, or for any other purpose, powerful enough to obstruct, in any part of the state, the due execution of the laws thereof, in the ordinary course of proceeding. The Virginia constitutional guaranties were then about the same as ours. "There was a provision against suspension of the writ of habeas corpus in any case." Article 4, § 15. In these statutes are found legislative constructions of Constitutions, harmonizing with the conclusions here stated as to the relation and purposes of the constitutional provisions, and also the power to place a part of a county under martial rule, notwithstanding the courts may be open in some other part thereof.

The offenses for which the petitioners were punished were committed in an interim between two successive periods of martial government. The first proclamation was raised about the middle of October, and the disturbances which had occasioned it immediately broke out again, and these offenses were of the kind and character which had made the occupation necessary. About the middle of November there was a second proclamation of a state of war. Just a few days before this second declaration, these offenses were committed, and the offenders were found within the military zone, and were arrested, tried, and convicted. If the offenses had been wholly dis-

connected with the insurrection and not in furtherance thereof, there might be doubt as to the authority of the military commission to take cognizance of them, although there are authorities for such jurisdiction and power as to any sort of offense committed within the territory over which martial law has been declared, and remaining unpunished at the time of the declaration thereof.

We are not reviewing the sentences complained of, nor ascertaining or declaring their legal limits. Our present inquiry goes only to the question of legality of the custody of the respondent at the present time and under the existing conditions. The territory in which the offenses were committed is still under martial rule. It suffices here to say whether the imprisonment is, under present conditions, authorized by law, and we think it is. We are not called upon to say whether the end of the reign of martial law in the territory in question will terminate the sentences, and upon that question we express no opinion.

Upon the facts set forth in the petition, we are of the opinion that the petitioners are in lawful custody, and we therefore remand them to the custody of the respondent.

Petitioners remanded.

ROBINSON, J. (dissenting). The majority opinion boldly asserts that the sacred guaranties of our State Constitution may be set aside and wholly disregarded on the plea of necessity. It had long been supposed that such a doctrine was forever condemned and foreclosed in this State. It was believed that the ringing denouncement against that doctrine in the opening sentences of our Constitution was sufficient to bar it from recognition by any citizen, official, or judge. The unmistakable words were supposed to be too clear ever to endanger our people by a disregard of their meaning. Hear them: "The provisions of the Constitution of the United States, and of this State, are operative alike in a period of war as in time of peace, and any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good government, and tends to anarchy and despotism." Art. 1, § 3.

How closely akin are these words to those that were uttered by the Supreme Court of the United States shortly prior to the adoption of our Constitution: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence." *Ex parte Milligan*, 4 Wall. 120, 18 L. Ed. 281.

A decision based on that which our people have so clearly condemned and inhibited from recognition in our State government, and which the highest tribunal in the land has so plainly declared to be pernicious and to have no place in our form of government, meets my emphatic dissent. * * *

Martial law can not rightly be sanctioned in West Virginia in the face of this constitutional declaration. For, as the majority opinion admits, martial law is a departure from the Constitution, a plain violation thereof, under the plea of necessity. It substitutes the law of a military commander for the law of the Constitution. It is the total abrogation of orderly presentment and trial by jury, so jealously guarded by the Constitution. Then, since martial law is such a plain departure from the Constitution, that instrument itself brands martial law as subversive to good government and as tending to anarchy.

Having made this general declaration against martial rule, the makers of our Constitution went further. They provided that * * * "the privilege of the writ of habeas corpus shall not be suspended." Art. 3, § 4. * * * By providing that the privilege of the writ of habeas corpus should at all times be available, they were simply again providing against the claim that constitutional guaranties may be suspended on the plea of necessity; for, as long as the writ of habeas corpus is available, constitutional guaranties can not be ignored. That which Blackstone said about the constitution of his country is equally applicable to ours: "Magna Carta only, in general terms, declared, that no man should be imprisoned contrary to law; the habeas corpus act points him out effectual means, as well to release himself, though committed even by the king in council, as to punish all those who shall thus unconstitutionally misuse him." Book 4, 439. This great, effective writ, by the terms of our State Constitution, is always available to any citizen deprived of a constitutional guaranty. Since it is so available at all times, how can any departure from the Constitution be allowed? Indeed the provision that the privilege of the writ of habeas corpus shall not be suspended is itself virtually a prohibition against martial law, for the availability of the writ and the recognition of martial law are totally inconsistent. "Suspension of the writ of habeas corpus is essentially a declaration of martial law." Messages and Papers of the Presidents, Vol. 10, page 465. "Promulgation and operation of martial law within the limits of the Union would necessarily be a virtual suspension of the habeas corpus writ for the time being." DeHart's Military Law, 18. "The declaration of martial law in the State has the effect of suspending it." Cooley, Principles of Constitutional Law, 301. "Practically, in England and the United States, the essence of martial law is the suspension of the privilege of the writ of habeas corpus, that is, the withdrawal of a particular person or a particular place or district of country from the authority of the civil tribunals." Halleck's International Law, Vol. 1, page 502. See also May's Constitutional History, ch. 11. The Great Lincoln so understood it. In his proclamations he merely suspended the writ of habeas corpus. Messages and Papers of the Presidents, Vol. 6. The founders of our state government really could have inhibited martial law by no stronger terms: "The privilege of the writ of habeas corpus shall not be suspended."

Not content with the two declarations against martial law which we have seen, the founders grew even more specific. They again said:

"The military shall be subordinate to the civil power; and no citizen, unless engaged in the military service of the State, shall be tried or punished by any military court, for any offense that is cognizable by the civil courts of the State." Art. 3, § 12. There is no ambiguity in these words. He who runs may read. They directly strike at martial law; they directly inhibit martial law. For, the height of martial law is the supplanting of the civil courts by military courts. But this provision expressly ordains that military courts shall never take the place of the civil courts of the State for the trial of civil offense. No military sentence for a civil offense can rightly stand in the face of these words. Nor can these words rightly be overlooked in order to uphold any such military sentence. To do so is to make the constitution a rope of sand. * * *

It is said that the State must live. So must the citizen live and have liberty—the constitutional guaranties vouchsafed to him. The founders of our State government saw fit to exclude this claimed theory of implied or presumed right of self-defense in a State. They knew it to be absolutely unnecessary as to any State in the American Union under the Constitution of the United States. They knew that it was even more likely to lead to abuse than to good. They could well afford to disclaim it by positive prohibitions against its exercise; for the Constitution of the Union fully protected the State. Were they not consistent in denouncing and prohibiting a principle of self-defense wholly out of harmony with constitutional government, and in relying on the safety vouched to the State by the general government of the Union of which it is a part? Was not the guaranty of the great general government sufficient for the continued life of the State? That guaranty speaks plainly: "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence." Art. 4, § 4. Does the State for its preservation need methods so at variance with constitutional guaranties as is martial law when it may obtain the power of the Union to suppress even domestic violence? Can not the militia and the United States army pacify any section of the State, or the whole State, by methods strictly within the Constitution and laws? It was so believed when the Federal government was formed. Federalist, No. 42. Referring to this guaranty by the general government, a renowned author and judge says: "This article, as has been truly said, becomes an immense acquisition of strength and additional force to the aid of any state government in case of internal rebellion or insurrection against lawful authority." Cooley, *Principles of Constitutional Law*, 206. See also 1 Tucker's *Blackstone*, App. 367.

It is claimed that the power given by the Constitution to the Governor, as commander-in-chief of the military forces of the State, to "call out the same to execute the laws, suppress insurrection and repel invasion," authorizes a proclamation of martial law. Are these words to undo every other guaranty in the instrument? Can we overturn the many clear, direct, and explicit provisions, all tending to protect against substituting the will of one for the will of the people,

by merest implication from the provision quoted? That provision gives the Governor power to use the militia to execute the laws as the Constitution and legislative acts made in pursuance thereof provide they shall be executed. It certainly gives him no authority to execute them otherwise. In the execution of the laws the Constitution itself must be executed as the superior law. The Governor may use the militia to suppress insurrection and repel invasion. But that use is only for the purpose of executing and upholding the laws. He can not use the militia in such a way as to oust the laws of the land. It is put into his hands to demand allegiance and obedience to the laws. It, therefore, can not be used by him for the trial of civil offenses according to his own will and law; for, to so use it would be to subvert the very purpose for which it is put into his hands. By the power of the militia he may, if the necessity exists, arrest and detain any citizen offending against the laws; but he can not imprison him at his will, because the Constitution guaranties to that offender trial by jury, the judgment of his peers. He may use military force where force in disobedience to the laws demand it; but military force against one violating the laws of the land can have no place in the trial and punishment of the offender. The necessity for military force is at an end when the force of the offender in his violation of the laws is overcome by his arrest and detention. There may be force used in apprehending the offender, and in bringing him to constitutional justice, but surely none can be applied in finding his guilt and fixing his punishment.

It is further claimed that the statute which says that the Governor may declare a state of war in towns, cities, districts, or counties where invasion, insurrection, rebellion or riot exists, is legislative authority for martial law. Code 1906, c. 18, § 92. The readiest answer to this argument is that a declaration of war is not a declaration of martial law. The mere presence of war does not set aside constitutional rights and the ordinary course of the laws. Civil courts often proceed in the midst of war. Again, if the act could be construed to contemplate martial law, it would be plainly contrary to the provisions of the State Constitution which we have noticed and would be utterly invalid. Moreover, it is not within the power of a State legislature, even when not so directly forbidden as in ours, to authorize martial law. Martial law rests not on constitutional, congressional, or legislative warrant; it rests wholly on actual necessity. Nothing else can ever authorize it. And that necessity is reviewable by the courts. * * *

What actual necessity justified the creation of this military commission and the recognition of its powers to supplant the civil courts? As we have seen, nothing but the complete lack of power of the civil courts for the trial of the charges against Nance and Mays, arising by the annihilation and inoperation of those courts, could, if martial law was at all allowable, justify their military trial and sentence. Could Nance and Mays have been tried for the offenses with which they were charged by the civil courts, under the ordinary forms of law, as an actual fact? We know by the record of these cases, we know judicially, that they could have been so tried. But an answer

that is attempted is this, that the Governor by his proclamation had set off the portion of the county in which the offenses were committed and the offenders were arrested, as a martial law district. Again we say the mere proclamation could not alone make the necessity. The physical status must make it. No physical status existed, like the destruction of the ordinary courts, to make it necessary to try Nance and Mays other than they would have been tried if no disturbances had existed in Cabin Creek District. Those disturbances had not interrupted the very court that would have tried them if there had been no such disturbances. Those disturbances did not physically prevent the transportation of Nance and Mays out of the riotous district to the county seat for trial. If they could be transported out of that district to Moundville for imprisonment, as they were, they could readily have been transported to Charleston for trial. It is said that the process of the court was prevented from execution in that district by the disturbances. That made no necessity for trial there. Surely the militia which was in possession of the district could execute all process of the court, or cause the sheriff so to do. That was a very proper sphere of the militia in a riotous district. Ballantine, post. It can legally assist in the execution of the process of the civil courts. Thus, it may assist in the execution of the laws. But plainly it can not supplant operative civil courts. The militia must aid the courts, not supplant them. Both are created by the same Constitution. They belong to the same people. They must work in harmony as the people contemplated when they establish both. * * * This principle, that accessibility to the ordinary civil courts excludes resort to martial law, is established by the decision in the Milligan Case in no uncertain language. We need no greater precedent. * * *

Will the reader of this opinion reserve hasty judgment against conclusions which it announces, until he has made studious examination of the citations herein and the three following expositions on the subject of martial law, together with the cases cited in them:

"Military Commissions," Garfield's Works (Hinsdale), Vol. 1, page 143.

"What is the Justification of Martial Law," Lieber, War Dept. Doc. No. 79; North American Review, Nov. 1896.

"Martial Law," Ballantine, Columbia Law Review, June 1912.

The decisions and treatises relied on herein make no distinction in the test for martial law, whether in pacific districts or in the theater of actual war. In the one place as well as in the other the test is the same—the want of operative civil courts. An examination of the subject will not sustain a contention that the courts and the writers referred to were dealing only with martial law outside of the theater of actual war. They clearly show that martial law is as objectionable in the one place as in the other, unless it is justified by the absence of civil law. * * *

Additional Opinion.

POFFENBARGER, P. The attempt, in the dissenting opinion prepared since the filing of the court opinion, to apply to these cases principles, deemed clearly inapplicable by all concurring in the deci-

sion, renders it proper, in our judgment, to file an additional opinion, pointing out more specifically the grounds of distinction, and also to direct attention to the nonjudicial and speculative character of much of the matter quoted in the dissenting opinion.

The *Milligan Case*, 4 Wall. 2, 18 L. Ed. 281, the opinion in which constitutes the real basis of the elaborate argument against the views of the majority of the court, arose in the state of Indiana, in which there was no actual war nor any pretense thereof. That state was in a military, but nevertheless peaceable, district. Milligan was a citizen of the state, arrested therein upon a charge of conspiracy against the government of the United States, tried on that charge by a military commission, convicted and sentenced to death. * * *

It was against the attempted misapplication of martial law to the pacific state of Indiana and her citizens, on the ground of the existence of a state of actual war in other portions of the Union, but not extending into Indiana, that the thunderous eloquence and invincible logic of Garfield, Black, McDonald, and Mr. Justice Davis were directed. All of them admitted its proper application to the theater of actual war in the Southern states. * * *

The dissenting opinion confuses the occasion and conditions of a state of war with the suspension of the writ of habeas corpus. During the troublous times of the Civil War, there were attempted and actual suspensions of the writ in pacific portions of the country. That alone did not create war in such territory, and substitute military for civil rule. It was an express suspension of the writ in tranquil territory, and no more. As the power was abused, and its exercise wrought injustice, it has been forbidden by the Constitution. But there is necessarily an informal and implied suspension in every instance of actual war throughout the field of military operations, as the opinion in the *Milligan Case*, and practically all other authorities, admit. * * *

An article prepared by Judge Advocate General of the U. S. Army, Norman G. Lieber, relied upon in the dissenting opinion, like the decision in the *Milligan Case*, deals exclusively with rights and powers in pacific territory, not in the theater of actual war. He begins by naming the four kinds of military jurisdiction: (1) Regulation of the army; (2) military rule in an enemy's territory, during occupation thereof; (3) military power in time of war, insurrection, or rebellion over persons in the military service, as to obligations arising out of such emergency, and not falling within the domain of military law, nor otherwise regulated by law, an application of the doctrine of necessity, founded on the right of national self-preservation; and (4) martial law at home, or as a domestic fact, by which is meant military power exercised in time of war, insurrection, or rebellion in parts of the country retaining allegiance. He then says: "It is to this last-mentioned kind of military jurisdiction that these remarks apply." Though he thus expressly says he is not discussing the exercise or limits of military power in the theater of actual war, insurrection or rebellion, but only the limits of such power in parts of the country retaining allegiance, necessarily tranquil country, the dissenting opinion takes no notice of the subject of discussion, and treats his observations as applicable to powers

and transactions in insurrectionary territory, officially declared to be in a state of war. This is a palpable oversight or misapprehension of the true meaning of his observations and citations of authority. His quotation from the opinion in *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581, shows this. We read: "In relation to the act of the Legislature declaring martial law, it is not necessary in the case before us to inquire to what extent, nor under what circumstances, that power may be exercised by a state. Unquestionably a military government, established as the permanent government of a state, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the state authorities. And unquestionably a state may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the preservation of order and free institutions, and is as necessary to the states of this Union as to any other government. The state itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition too formidable, and so ramified throughout the state as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war, and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition."

Having quoted this, Gen. Lieber said: "In regard to this case, it is deserving of particular notice that it is an error to rely on it in proof of the theory that Congress has the power to declare martial law, in the sense in which we have been using that term. It is true that this was a case of so-called 'martial law' declared by the Legislature; but what did the Legislature mean by it? The term has no fixed meaning, even at the present day. Different writers still give it different meanings. When the Legislature of Rhode Island made use of it in 1842, it probably was intended to have no more definite meaning than that the militia of the state was to use its military power to suppress the enemies of the state. It was an authorization to do what was done when the military officer broke into the house of one of the enemies of the state in order to arrest him. He was a public enemy against whom the military power had been called out. It is evident that this is not the kind of martial law which we have been discussing."

In the face of the declaration by the Supreme Court of the United States, above quoted, it is argued that a state cannot declare a state of war and adopt the usages of war in the suppression of an insurrection, because the national government may be summoned to the aid of the state in its efforts to uphold and enforce its authority. As the court in *Luther v. Borden* plainly says, that national obligation and right is in aid of the state government, not in exclusion thereof. It was never intended that the federal government should assume the duties of state government, nor reduce the state to a condition of dependence upon the discretionary exercise of federal power respecting the maintenance

of its authority within its own territory, not in conflict with the limitations of the national Constitution upon the powers of the states. The federal government assumed no obligation to do for the states what they can do for themselves, nor laid any restraint upon their sovereign powers, except in certain instances or for the accomplishment of enumerated federal purposes. Observe that Judge Cooley said, in the quotation found in the dissenting opinion, this article of the national Constitution is an "acquisition of strength and additional force to the aid of any state government." Why should we be asked to read this as if it said "to the exclusion of the powers of any state government?" * * *

That, to justify the application of martial rule to a territory or section of a state, the courts thereof must be wholly closed and inoperative is not sustained by the authorities cited in the dissenting opinion. Some passages in the opinion in the *Milligan* Case seem to say so, but others say the contrary. The court based its position on its judicial knowledge that "in Indiana the federal authority was always unopposed, and its courts always open," and "their process unobstructed." The opinion says: "After this military tribunal was ended, the circuit court met, peacefully transacted its business, and adjourned, * * * required no military aid to execute its judgments, * * * and was never interrupted." The opinion also says that on the theater of active military operations, where war really prevails, "there is necessity to furnish a substitute for the civil authority, * * * and it is allowed to govern by martial law until the laws can have their free course"; and that "martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction." Having spoken of open or unobstructed courts having free course, as precluding martial law, and overthrown, obstructed, or interrupted courts, as justifying it, shall we not take the opinion as having stated just what the court meant? How else may we logically and sensibly interpret its language? Can we say it meant only one of several different things mentioned as producing the same effect? No doubt they meant just what Mr. J. S. Black, the ablest of *Milligan's* counsel, and the greatest lawyer in the case, said of the general plan of our constitutional government in his argument: "Military force repels invasion and suppresses insurrection; you preserve discipline in the army and navy by means of courts-martial; you preserve the purity of the civil administration by impeachment of dishonest magistrates; and crimes are prevented and punished by the regular judicial authorities." Of trials by military commissions, in the war areas, he said: "I have made no allusion to their history in the last five years. But what can be the meaning of an effort to maintain them among us?" This was an admission of their validity in the theater of war and their invalidity in pacific territory. *Milligan* did not apply for his writ until after the close of the war, and it was not decided until December, 1866. A sitting court, whose process is obstructed by insurrectionary force, is, in a practical sense, no court, and might as well be "closed" or "overthrown."

In dealing with grave questions such as this, we must govern ourselves by settled rules and principles of law, including the rules of con-

struction and interpretation. It is not permissible to set aside or ignore them in trivial cases. The greater the moment of the question or matter involved, the greater the reason for strict adherence to law and observance of distinctions in the application of principles and precedents.

5. Ex parte McDONALD.

(Supreme Court of Montana, 1914. 49 Mont. 454, 143 Pac. 947, L. R. A. 1915B, 988, Ann. Cas. 1916A, 1106.)

Petitions for writs of habeas corpus by Mitchell McDonald and others, united with a petition for the same writ by Dan Gillis. Writs denied as to the first petitioners, and granted as to the last; the petitioner being remanded for trial.

SANNER, J. On September 1, 1914, Hon. S. V. Stewart, Governor of this state, issued his executive proclamation, as follows:

"Proclamation.

"Whereas, it has become apparent that conditions of lawlessness and defiance of authority prevail in the county of Silver Bow, state of Montana, and that combinations to resist the execution of process exist in said Silver Bow county, and that the power of the county has been exerted and has not been sufficient to enable the officers having process to execute it; and

"Whereas, it has been represented to me by properly constituted authorities that the peace officers of said county are unable to secure service of process and compliance with the law; and

"Whereas, it is made sufficiently to appear to me that peace and quiet cannot be re-established in said county of Silver Bow without the aid of some force other than the present constituted authority of said county:

"Now, therefore, I, S. V. Stewart, as Governor of the state of Montana, under and by virtue of the authority vested in me by the Constitution and the statutes of said state, do hereby proclaim the said county of Silver Bow, state of Montana, to be in a state of insurrection, and do hereby declare that said Silver Bow county, state of Montana, be and is hereby under martial law, and under the jurisdiction of the military authorities of said state of Montana; and such military forces as may be ordered into service to enforce the provisions of this proclamation shall be under the command of Major Dan J. Donohue. This proclamation to continue until the same shall be revoked or modified. * * *

[Signed] S. V. Stewart.

"By the Governor:

"A. M. Alderson, Secretary of State."

In accordance with the above proclamation, military forces of the state under the command of Major Dan J. Donohue arrived in Silver Bow county, took military possession thereof, and such military pos-

session has since continued and still continues. On the 12th day of September, Mitchell McDonald, Owen Smith, Joseph Bradley, E. W. Malone, Ed Ross, and James Chapman filed in this court their petitions for writs of habeas corpus, alleging, in substance, that they were being unlawfully detained and restrained of their liberty by the Governor and by Major Donohue and certain other military officers of the state who were named as respondents, in that the petitioners had been arrested without warrant and were being held without bail, to be tried, without a jury, before an alleged court or tribunal set up by the military authorities, upon charges to the petitioners unknown, and this notwithstanding they had infringed no law and were not members of the organized militia of the state. To these petitions respondents made return, setting forth their official character, the proclamation of the Governor, and also a proclamation made by Major Donohue upon his arrival in Silver Bow county with the military forces, and alleging that said county was then in a state of insurrection; that the emergencies of the situation demanded the arrest and detention of the petitioners for the successful accomplishment of the purpose for which said military authorities had been sent into Silver Bow county by the Governor, "such detention for the present being necessary to prevent the petitioners from committing overt acts in defiance of the military authority of said military forces"; that the said petitioners were leaders of those engaged in insurrection, and had been, and if discharged from arrest, would be, active participants in fomenting and keeping alive the condition of insurrection existing in Silver Bow county; and that it is the purpose of the respondents to release and discharge petitioners from military arrest as soon as that can safely be done with reference to the suppression of the existing state of insurrection, and then surrender them to the civil authorities, to be dealt with in the ordinary course of justice after such insurrection is suppressed. Upon the return and the evidence taken at the hearing, this court made an order denying the release of petitioners, with leave to re-petition after 30 days, if at that time they had not been delivered to the civil authorities and the courts were then open and able to execute their process. The reasons for that order will be set forth in the course of this opinion.

Thereafter, and on September 24, 1914, Dan Gillis filed his petition for a writ of habeas corpus, alleging unlawful detention and restraint by the same respondents, and that such detention and restraint are had and claimed by virtue of a commitment issued on September 21, 1914, by Jesse B. Roote, as major and judge of a certain summary court set up by the military authorities in Silver Bow county, after an alleged trial before said Jesse B. Roote without a jury, upon a charge of assaulting and resisting an officer, and in which said proceeding said Jesse B. Roote assumed to adjudge the petitioner guilty and to render judgment that he be imprisoned in the county jail in Silver Bow county, or any prison in said county, for the term of 11 months and pay a fine of \$500, and all this notwithstanding all of the district courts of said Silver Bow county were during the period covered by said proceeding, and since have been, open and actively attending to business, including the trial of causes. The effect of the return to this petition is to admit the detention of the petitioner under the commitment above

mentioned, and such detention is sought to be defended upon the following grounds:

"That by the proclamation of the Governor martial law became established in Silver Bow county; that by the proclamation of Major Donohue the summary court above referred to was created, 'and it was ordered that all acts which would constitute an offense or offenses under the penal laws of Montana or the ordinances of the city of Butte, as well as any act which would hinder or tend to hinder, delay, or obstruct the work of the military forces in restoring order, should be punishable as offenses under the martial law, and that such punishments should be inflicted as in the judgment of said officer constituting said summary court in cases of minor offenses should be suitable.' It is also respectfully claimed 'that the Supreme Court of Montana is without jurisdiction in the premises to discharge said Dan Gillis from arrest and imprisonment by reason of the facts and things hereinbefore recited.'"

It will be readily noted that the position taken by the respondents in the Gillis case is much broader than that presented by the returns in the causes first presented. The respondents now maintain:

"That the Governor, as the chief executive officer of the state, has and had the authority, under the Constitution and statutes of the state, to issue the proclamation referred to, and to order the state troops into the district described therein, and that when the proclamation, as is the case here, declares absolute martial law, that of itself has the effect of suspending all governmental civil tribunals, and that the supreme authority and responsibility of government is thereby vested in the military forces, * * * and such military forces, in the discharge of the duties resting upon them, may establish courts for the trial of offenders who violate military orders or who violate the laws of the state within the troubled zone."

The questions thus involved are extremely grave and far-reaching in effect.

A. That the Governor had the authority to proclaim a state of insurrection to exist in the county of Silver Bow, and to detail the organized militia of this state to suppress such insurrection, is settled by the express language of our Constitution:

"The supreme executive power of the state shall be vested in the Governor, who shall see that the laws are faithfully executed. The Governor shall be commander in chief of the militia forces of the state, * * * and shall have power to call out any part or the whole of said forces to aid in the execution of the laws, to suppress insurrection or to repel invasion." Const. art. 7, § 5.

Nor is there the slightest doubt that, as he must determine, so he alone can determine, when a state of insurrection exists and when the conditions require the interposition of military aid. Neither this court nor the local authorities can be the arbiter in such a matter. Not this court, for it exercises judicial functions alone; and not the local authorities, for, although the enforcement of the law is primarily with them, public opinion and official attitude may be dominated by the forces who would take the law into their own hands. In every age and in every country there has come a time when portions of the peo-

ple, roused to passion by some real or fancied cause, have sought by violence to enforce what they conceived to be their rights. When such an emergency arises it calls for prompt and effective action, for this is a government of law, and no permanent redress of grievances is possible through the wanton destruction of life or property. In such a situation the Governor is not to be thwarted and his hands are not to be tied by the judgment of local authorities who may be overconfident or who may be acquiescent. "It is said that this power * * * is dangerous to liberty, and may be abused. All power may be abused, if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual." *Luther v. Borden*; 7 How. 1, 12 (12 L. Ed. 581).

In a case of insurrection it is not merely the local law that is set at naught. It is the law of the state. Our Constitution places the responsibility for the maintenance of that law exactly where it belongs; our statutes recognize the fact in the provision that the Governor may (but need not) put the militia in charge of the local authorities (Rev. Codes, § 8967), and it is the duty of this court to refrain from interference or question, so long as the Governor remains within the limits established by the Constitution. So much being true, the recitals in the proclamation that a state of insurrection existed in the county of Silver Bow cannot be controverted, but must be taken as final and conclusive. *Martin v. Mott*, 12 Wheat. 19, 6 L. Ed. 537; *Luther v. Borden*, *supra*; *Moyer v. Peabody*, 212 U. S. 78, 29 Sup. Ct. 235, 53 L. Ed. 410; *Moyer v. Peabody* (C. C.) 148 Fed. 870; *Franks v. Smith*, 142 Ky. 232, 134 S. W. 484, L. R. A. 1915A, 1141, Ann. Cas. 1912D, 319; *In re Moyer*, 35 Colo. 159, 85 Pac. 190, 12 L. R. A. (N. S.) 980, 117 Am. St. Rep. 189; *Barcelon v. Baker et al.*, 5 Philippine Reports, 87; *In re Boyle*, 6 Idaho, 609, 57 Pac. 706, 45 L. R. A. 832, 96 Am. St. Rep. 286; *Ex parte Moore*, 64 N. C. 807. For reasons equally cogent, we must presume the conditions, thus proclaimed, to continue until by executive order or proclamation it shall be otherwise declared. *Barcelon v. Baker et al.*, *supra*.

Prémising, then, that Silver Bow county was and is in a state of insurrection, and that the presence of the organized militia was and is necessary to the permanent restoration of order, what has that to do with the arrest and detention of McDonald and his copetitioners? We think it has much to do under any and every theory that may possibly be entertained touching the power of the Governor and the militia in cases of insurrection. It was distinctly asserted in the returns, and established to our satisfaction by the evidence taken upon the hearing, that McDonald and his copetitioners had not been arrested and were not being held for trial before any court-martial or other military tribunal, but that they had been arrested as leaders and inciters of the insurrection, and were being held as necessary measures for its suppression, to be turned over to the civil authorities for trial as soon as that could safely be done. After a consideration of all that was said in argument and of practically all the accessible literature on the subject, we are convinced that the theory which accords the least power to the Governor and to the militia in cases of insurrec-

tion is that he acts as a civil officer of the state, and that the military forces under him operate as a sort of major police for the restoration of public order; and we confidently assert that under this theory the arrest and detention, under the circumstances stated, can be justified and must be upheld. * * *

The release of McDonald and his copetitioners was therefore denied; but since the justification is necessity, and since it cannot obtain beyond the period of such necessity, we granted leave to reapply, having in mind that the course of events might or might not demonstrate the detention of these petitioners beyond the time indicated to be unnecessary.

B. Does it follow, then, that the Governor can suspend the writ of habeas corpus, declare martial law, and authorize the creation of military tribunals to try citizens for violations of the laws of the state? It should be said in justice to the Governor that he has not attempted to suspend the writ of habeas corpus, and we should not refer to the subject, but for the claim urged upon the return in Gillis' case: That this court is without jurisdiction to order a release. This claim can, of course, have no basis save upon the theory that the Governor, having declared martial law, ipso facto suspended the writ of habeas corpus. Certain decisions were presented which sustain this view (In re Moore, supra; State v. Brown, 71 W. Va. 519, 77 S. E. 243, 45 L. R. A. [N. S.] 996, Ann. Cas. 1914C, 1; Ex parte Jones, 71 W. Va. 567, 77 S. E. 1029, 45 L. R. A. [N. S.] 1030, Ann. Cas. 1914C, 31; Ex parte Field, 9 Fed. Cas. 1); but we do not care to discuss them, for it has been the settled law of this country ever since 1807 that the suspension of the writ of habeas corpus is a legislative and not an executive function (Ex parte Bollman, 4 Cranch, 75, 2 L. Ed. 554; Ex parte Merryman, Taney, 246, Fed. Cas. No. 9,487; Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281; Johnson v. Duncan, 3 Mart. O. S. [La.] 530, 6 Am. Dec. 675; Ex parte Benedict, Fed. Cas. No. 1,292; McCall v. McDowell, Fed. Cas. No. 8,673; In re Kemp, 16 Wis. 360; Ex parte Moore, supra). If, therefore, the power to suspend that writ must stand or fall with the power to establish absolute martial law, the inference is inevitable that no such régime can be established by the executive.

We prefer, however, to rest our conclusion upon other grounds. Absolute martial law, the character of rule which respondents claim to have been established in Silver Bow county, means nothing more nor less than the will of the military commander in the field. It "confers power of arrest, of summary trial, and of prompt execution; and when it has been proclaimed the land becomes a camp, and the law of the camp is the law of the land." Webster, in Luther v. Borden, 5 Works, 240. Such is the understanding of it as entertained by counsel for respondents, who in oral argument asserted that it meant the abrogation for the time being, of all the constitutional guaranties and of all the statutes of the state, and in whose brief we find authorities to similar effect. In re Ezeta (D. C.) 62 Fed. 1002; In re Egan, 8 Fed. Cas. 367; Commonwealth v. Shortall, 206 Pa. 165, 55 Atl. 952, 65 L. R. A. 193, 98 Am. St. Rep. 759. Some logical difficulty might be met in conceiving how a constitutional officer can constitutionally suspend the Constitution, or how any tribunal can try men for the violation of laws

whose force and effect are for the time being in abeyance. But we pass these and state the question to be this: Is it possible for the executive by proclamation or otherwise to constitutionally establish in this state any form of martial law which will authorize the conviction of a civilian for crime, without trial by jury?

The answer may be found in almost every page of Anglo-Saxon history since 1628. Prior to that time the crown had on various occasions attempted to extend the operation of martial law, either by applying it in time of peace, or to nonmilitary persons, or to nonmilitary offenses. Finally, the issuance by James I and Charles I of commissions to proceed under martial law for the purpose, not only of maintaining the discipline of the army, but also for bringing to more speedy punishment any crimes of whatsoever nature committed by civilians of a certain class, led to the historic Petition of Right in the year above mentioned. In the debate which occurred in the House of Commons on that occasion, the right to proclaim martial law was thoroughly discussed, and the views of such high authorities as Rolle and Coke were stated by the former as follows:

"Martial law is merely for necessity, when the common law cannot take place. * * * If an enemy come into any part where the common law cannot be executed, there may martial law be executed. If a subject be taken in rebellion, if he be not slain at the time of his rebellion, he is to be tried afterwards and by the common law."

Fifty years later, Sir Matthew Hale insisted that:

"Martial law is not a law, but something indulged rather than allowed as a law. The necessity of government, order, and discipline in an army is that only which can give it countenance. * * * Secondly, this indulged law is only to extend to members of the army and to those of the opposite army, and never may be so much indulged as to be exercised or executed upon others. Thirdly, the exercise of martial law may not be permitted in times of peace when the king's courts are open." History of the Common Law, c. XI.

These words are echoed, with illustrations, by Blackstone, from whom we may always learn the state of the common law at the time our Constitution was adopted. 1 Hammond's Blackstone, 695. Nor has any other view ever prevailed among the jurists and publicists of England. In *Grant v. Gould*, Lord Loughborough said:

"Martial law such as is described by Hale, and such also as it is marked by Mr. Justice Blackstone, does not exist in England at all."

And it is a notable fact that martial law has not been proclaimed in England since 1689—neither in the Jacobite risings, nor in the Gordon riots in the eighteenth century, nor in the disturbances which occurred at various times in the nineteenth century. It is quite true that in Ireland in 1798, and in the different British colonies since then, martial law has been proclaimed on several occasions, and the right to do so has been the subject of much parliamentary discussion. The prevalent view in these discussions seems to have been the one expressed by Lord Cardwell on the Jamaica troubles of 1867. He said that:

"While there was properly no such thing as martial law, there was no doubt a law of necessity which required that certain acts should be done for the suppression of the Rebellion, but not for the punish-

ment of persons concerned in it. * * * The law of necessity to which he had referred was strictly limited in time, and operated only for repression, and not for punishment."

The views above expressed were strongly enforced in 1867 by Justice Blackburn in *Queen v. Eyre*, and by Chief Justice Cockburn in *Queen v. Nelson*.

The sort of martial law for which respondents now contend is regarded in England as a strictly continental institution. It is applied by declaring the affected locality in "the state of siege," wherein "the constitutional guaranties are suspended." Professor Dicey comments upon it as follows:

"This kind of martial law is in England utterly unknown to the constitution. Soldiers may suppress a riot, as they may resist an invasion; they may fight rebels, just as they might fight foreign enemies; but they have no right under the law to inflict punishment for riot or rebellion." Dicey, *Law of the Constitution*, 381.

If they cannot inflict punishment for riot or rebellion, they cannot inflict it for any other offense against the municipal law.

Turning to our own country, we note that when the Constitution was adopted the common law on the subject was as stated by Justice Blackstone. We may also recall that there was a very keen appreciation and jealousy of their personal rights on the part of our forefathers—a jealousy which had been in part directed to this very subject of martial law by the acts of General Gage in New England and of Governor Dunmore in Virginia. It is also well known that, when the national Constitution was submitted to the people, over one-third of the vote was against it and many of the favorable votes it received were cast with much misgiving, due to the fact that it did not put in positive terms those safeguards to which the people "had been long accustomed to have interposed between them and the magistrate who exercises sovereign power." Madison, *Annals First Congress*, 450. It was explained that the Constitution was to be a grant of power, and therefore powers not expressly granted were reserved to the people; but "this explanation satisfied not one state." Bancroft's *History of Formation of Constitution*, p. 383 et seq. The general attitude was expressed by Jefferson, who, after extolling the merits of the new plan, added:

"I will now tell what I do not like: First, the omission of a bill of rights, providing clearly and without aid of sophism for freedom of religion, freedom of the press, protection against standing armies, restriction of monopolies, the eternal and unremitting force of the habeas corpus laws, and trial by jury in all matters of fact triable by the laws of the land, and not by the law of nations." 2 *Jefferson's Works*, 329.

Eight states coupled their assent with a demand for such a bill of rights. Thus clearly was it insisted that trial by jury should be guaranteed in every case then triable by jury at the common law; and as the common law did not then authorize violations of the laws of the land to be tried by military commission, it follows that the guaranty of trial by jury as contained in Amendment 6 must be taken in this sense.

And such we find to be the result of the adjudicated cases arising under the national Constitution. It would extend this opinion to in-

ordinate length to review them all, and we shall therefore content ourselves with a brief reference to a few whose meaning cannot be doubted:

Smith v. Shaw, 12 Johns. (N. Y.) 257, arose out of an arrest for trial by court-martial during the War of 1812, and the Supreme Court of New York, in disposing of an attempted plea of justification under the martial law, said:

"It is a general rule that, where such a court has neither jurisdiction of the subject-matter nor of the person, everything done is absolutely void. * * * None of the offenses charged against Shaw were cognizable by a court-martial, except that which related to his being a spy; and if he was an American citizen, he could not be charged with such an offense. He might be amenable to civil authority for treason, but could not be punished, under martial law as a spy. There was, therefore, a want of jurisdiction, either of the person or of the subject-matter, as to all the offenses alleged against the plaintiff."

To the same effect is *McConnell v. Hampton*, 12 Johns. (N. Y.) 234.

Johnson v. Duncan et al., 3 Mart. O. S. (La.) 530, 6 Am. Dec. 675, arose out of the declaration by General Jackson of martial law in the city of New Orleans, and the Supreme Court of Louisiana, touching that matter, declared:

"If it be said that the laws of war, being the laws of the United States, authorize a proclamation of martial law, I answer that in peace or in war no law can be enacted, but by the legislative power."

The next war fought upon our own soil was the great Rebellion, and, as might have been expected, it gave rise to much controversy and discordance of opinion touching the scope and power of martial law. All this, however, was set at rest by the great decision of the Supreme Court of the United States in the *Milligan Case*, wherein all that is now asserted by respondents was urged upon the court. * * *

As pointed out by an eminent military authority, there is nothing in *Mitchell v. Clark*, 110 U. S. 633, 4 Sup. Ct. 170, 312, 28 L. Ed. 279, or in any subsequent decision of the Supreme Court, to break the force of the *Milligan* decision. *Union College Lectures, Clous on Military and Martial Law*.

We are quite aware that, as indicated by Chief Justice Marshall in *Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672, the guaranties contained in the fifth and sixth amendments to the national Constitution are limitations upon the power of the United States, and not upon the power of the states; but the interpretation of them serves to show how they were understood in that behalf, and to furnish a guide to the proper understanding of like guaranties contained in article 3 of our state Constitution. *Ex parte Moore*, supra; *Franks v. Smith*, supra; *Johnson v. Duncan*, supra; *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 159; *Sheean v. Jones*, 44 Ill. 167; *Carver v. Jones*, 45 Ill. 334; *In re Kemp*, supra.

It is insisted, however, that under all the decisions the executive can establish martial law in time of war when the ordinary tribunals are not open, that an insurrection is war, and that the proof at bar shows the civil tribunals of Silver Bow county to have been closed. When in domestic territory the laws of the land have become suspended, not

by executive proclamation, but by the existence of war, the Executive may supply the deficiency by such form of martial law as the situation requires, but we deny that insurrection and war are convertible terms.

The term "war" is used in the books, not in its popular but in its legal sense, and only the national Congress can declare or recognize the existence of war. There is a very great distinction between insurrection and war. It is this: War is an act of sovereignty, real or assumed; insurrection is not. War makes enemies of the inhabitants of the contending states; but insurrection does not put beyond the pale of friendship the innocent in the affected district. War creates the rights and duties of belligerency, which to a mere insurrection are unknown. Doubtless an insurrection may become war, as was the case with the great Rebellion; but it does not become so in the legal sense until the rebellious party assumes political form. This was pointed out by the Supreme Court of the United States in the Prize Cases, 2 Black, 635, 673 (17 L. Ed. 459):

"In organizing this rebellion, they have acted as states claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the federal government. Several of these states have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign state. * * * It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force; south of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile, and belligerent power."

In internal wars the object is to coerce the power opposed to the sovereign, and because such power exercises jurisdiction and control de facto and claims it de jure over the territory under its sway, it is competent for the sovereign to exercise powers belonging to belligerents at international law. *Miller v. United States*, 11 Wall. 268, 20 L. Ed. 135; *Rose v. Himely*, 4 Cranch, 241, 272, 2 L. Ed. 608; *Santissima Trinidad*, 7 Wheat. 283, 5 L. Ed. 454; *Taylor*, *International Public Law*, §§ 449, 450.

How inapplicable all this is to a formless insurrection, and how impossible to characterize such a movement as a state of war, with all its powers and immunities, is pointed out by Mr. Justice Nelson in the Prize Cases cited:

"It has been argued that the authority conferred on the President by the act of 1795 invests him with the war power. But the obvious answer is that it proceeds from a different clause in the Constitution, and which is given for different purposes and objects, namely, to execute the laws and preserve the public order and tranquility of the country in a time of peace by preventing or suppressing any public disorder or disturbance by foreign or domestic enemies. Certainly, if there is any force in this argument, then we are in a state of war, with all the rights of war, and all the penal consequences attending it, every time this power is exercised by calling out a military force to execute the laws or to suppress insurrection or rebellion; for the nature of the power cannot depend upon the numbers called out. * * * The truth is this

idea of the existence of any necessity for clothing the President with the war power, under the act of 1795, is simply a monstrous exaggeration."

It was also the general belief, when the sixth amendment to the national Constitution was under consideration, that trial by jury could not be denied on account of any mere local disturbance. This is evidenced by the fact that in the first draft of that amendment as presented by Madison, in the second draft as presented by the congressional committee of 11, and in the third draft as reported by the special committee of 3, provision was specifically made for trials by jury out of the vicinage when the vicinage should be in a state of insurrection. Thorpe, *Const. Hist. U. S. Vol. II*, p. 199 et seq.

So far as the right to trial by jury in case of insurrection is concerned, it does not seem to us vitally important whether the courts are or are not open when the military appear. It may be granted that courts which are prevented by insurrection from executing their process are not open in contemplation of the law. To open them is a part of the duty devolving upon the military. It was conceded at bar that some of the courts of Silver Bow county are in operation, though it was insisted to be only such as are permitted by the military authorities; the others being closed by their order. No such cloture can be recognized.

We have somewhere met with the argument that, because the insurrection may be prolonged, the summary trial of offenders is preferable to their indefinite detention. This is not even an argument from necessity, but from convenience only. We know of but one court of last resort which gives it any countenance, and that court we do not choose to follow. Nor are we impressed with the suggestion that military trials are necessary in Silver Bow county, because the state of public feeling would render trials by jury ineffective—that the guilty will not be punished. We are loath to believe that the courts and citizenship of that county are so weak as this; but, if they are, ample relief is afforded the state by the statutory provisions for change of venue.

Martial law, however, is of all gradations, and although the Governor cannot, by proclamation or otherwise, establish martial law of the character above discussed, he is not barred from declaring it in any form. We must therefore assume that, in using that phrase in his proclamation, he meant only such degree or form of martial law as he was constitutionally authorized to impose. As we have seen above, he was authorized to detail the militia to suppress the insurrection and to direct their movements, without regard to the civil authorities, and they could in the performance of their work take such measures as might be necessary, including the arrest and detention of the insurrectionists and other violators of the law, for delivery to the civil authorities; but neither he nor the military under him can lawfully punish for insurrection or for other violations of the law. The courts cannot be ousted by the agencies detailed to aid them; nor can their functions be transferred to tribunals unknown to the Constitution.

A very brief notice will suffice for the contention that in consequence of the passage of the Donohue bill by the Legislature, which was subsequently defeated on referendum, we have no organized militia in this state, and therefore all that has been done was illegal. There is

nothing in this. The militia of this state consists of all its able-bodied citizens between the ages of 18 and 45 years, with certain exceptions. Const. art. 14, § 1. The Governor was authorized to call any or all of them to quell the insurrection, without regard to whether they belonged to the National Guard or not. But we have an organized militia. The passage of the Donohue bill by the Legislature was not final, and never became effective by virtue of the referendum. It required the approval of the people before becoming a law, and this it never had. If it did not become a law for constructive purposes, it could not be one for repealing purposes. *State ex rel. Hay v. Alderson*, 49 Mont. 387, 142 Pac. 210, Ann. Cas. 1916B, 39.

The trial and commitment of petitioner Gillis were void, and his detention thereunder cannot be upheld. But he is not entitled to his release. The record discloses an abortive attempt to try and punish him for an alleged violation of the laws of the state. He must, therefore, be remanded to the custody of respondents, to be dealt with according to law. In *re Jones*, 46 Mont. 122, 126 Pac. 929.

It is so ordered.

BRANTLY, C. J., and HOLLOWAY, J., concur.

6. Ex parte KING.

(District Court of the United States, Eastern District of Kentucky, at Covington, 1917. 246 Fed. 868.)

COCHRAN, District Judge. This is a writ of habeas corpus that is before me. It was issued upon the petition of Simon King, father of George King, the person held in custody. He is so held by the jailer of Campbell county, in this district, to whom the writ was directed, upon a charge of murder. He was first committed by the county judge of that county upon an examining trial, and since then he has been indicted by the grand jury thereof for that offense. He is a private in Company C, Second Kentucky Infantry, National Guards, and subject to military law, as provided by article 2 of Articles of War, section 2308a, United States Compiled Statutes 1916, p. 3949, and has been since April 13, 1917. The person whom he is charged with murdering was Christopher Kolhoven, then a policeman of the city of Newport, in that county. It is charged that he did so on July 11, 1917. The claim is that the killing took place on one of the streets of that city, and that it was not done in the performance of any duty as a soldier.

On July 28, 1917, the captain of his company preferred the charge against him of having committed the crime of murder, and Gen. Roger D. Williams, commander of the brigade to which the Second Kentucky Infantry belongs, has filed an intervening petition, praying that the prisoner be delivered to the military authorities, to be tried by a court-martial on the charge so preferred against him. The commonwealth of Kentucky has appeared by the commonwealth's attorney of Campbell county, and resists the delivery of the prisoner to the military authorities. The prisoner claims that the killing was

committed by him in the performance of his duty as a soldier. The time of the killing was a time of war. The United States has been in a state of war with Germany since April 6, 1917.

The question which the case presents for consideration is whether the Campbell circuit court has jurisdiction now to try him for the offense for which he has been indicted. It is not whether it had jurisdiction to indict him and may not hereafter have jurisdiction to try him. It is not necessary to determine this question at the present hearing. The question before me may be narrowed to that stated, to wit: Whether that court has jurisdiction to try him under existing conditions, and to that end to withhold his custody from the military authorities.

The solution of the question depends upon the true construction of the articles of war in force at the time of the killing. They are to be found in section 3, c. 418, 39 Stat. 650, being Act Aug. 29, 1916 (U. S. Compiled Stat. 1916, § 2308a), which takes the place of section 1342, U. S. Rev. Stat. It is thereby provided that section 1342 be amended to read as therein provided. It is well to approach its pertinent provisions from the viewpoint of how the matter stood under section 1342 as it formerly was and here from the viewpoint of how it stood in time of peace. It stood then, as under the present statute, differently in time of war from what it stood in time of peace, and we are only concerned as to how it stood and stands in time of war. But it will aid in understanding how it stood and stands in time of war to understand first how it stood and stands in time of peace.

By section 1342 before it was thus amended a soldier of the United States army could be court-martialed in time of peace for offenses committed by him in violation of the criminal laws of a state or of the United States. Such jurisdiction was conferred by article 62. Thereby jurisdiction was conferred of "all crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of to the prejudice of good order and military discipline." Under this article a capital crime could be dealt with only as a disorder or neglect prejudicial to good order and military discipline. In *re Stubbs* (C. C.) 133 Fed. 1012. A case where such jurisdiction was exercised is that of the soldier who attempted to kill the assassin, Guiteau. *Ex parte Mason*, 105 U. S. 696, 26 L. Ed. 1213.

The jurisdiction so conferred, however, is not exclusive, but is concurrent with that of the civil courts. *Grafton v. United States*, 206 U. S. 333, 348, 27 Sup. Ct. 749, 51 L. Ed. 1084, 11 Ann. Cas. 640; *Franklin v. United States*, 216 U. S. 559, 30 Sup. Ct. 434, 54 L. Ed. 615. And by article 59 of the civil courts were given priority in the exercise of jurisdiction. It was thereby provided that:

"When any officer or soldier is accused of a capital crime, or of any offenses against the person or property of any citizen of any of the United States, which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company, or detachment to which the person so accused belongs are required, except in time of war upon application duly made by or on behalf of the party injured, to use their utmost endeavors to deliver

him over to the civil magistrate and to aid the officers of justice in apprehending and securing him, in order to bring him to trial."

As the requirement was that the officers specified should so do "except in time of war," this provision had application only to time of peace; and by virtue thereof in time of peace the military authorities were bound to give way to the civil. But this was not the only jurisdiction conferred on courts-martial of offenses against the criminal laws of a state. By article 58 they were given other jurisdiction thereof, but it is expressly limited to time of war. That article is in these words:

"In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing with an intent to commit murder, * * * or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment for the like offense by the laws of the State, Territory, or district in which such offense may have been committed."

It has been held by the Supreme Court in the case of *Coleman v. Tennessee*, 97 U. S. 509, 24 L. Ed. 1118, that, where an offense covered by this article is committed in time of war in enemy country, the military authorities have exclusive jurisdiction of the offense. There, in time of the Civil War, a federal soldier had committed the crime of murder in the state of Tennessee whilst it was in the military occupation of the United States, with a military governor at its head, appointed by the President, and, as there held, enemy's country. It was held that the soldier was not amenable to the laws of that state after it ceased to be enemy's country upon the close of the Civil War. This position was based upon the principles of international law, and not on the interpretation of the statute. Though the question was not involved therein, Mr. Justice Field considered how the matter would have been, had the crime been committed in a loyal state, which is the case we have here. It was held that it would have been otherwise. He said:

"But the section does not make the jurisdiction of the military tribunals exclusive of that of the state courts. It does not declare that soldiers committing the offenses named shall not be amenable to punishment by the state courts. It simply declares that the offenses shall be 'punishable,' not that they shall be punished by the military courts; and this is merely saying that they may be thus punished. Previous to its enactment the offenses designated were punishable by the state courts, and persons in the military service who committed them were delivered over to those courts for trial; and it contains no words indicating an intention on the part of Congress to take from them the jurisdiction in this respect which they had always exercised. With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress, in the absence of clear and direct language to that effect. We do not

mean to intimate that it was not within the competency of Congress to confer exclusive jurisdiction upon military courts over offenses committed by persons in the military service of the United States. As Congress is expressly authorized by the Constitution 'to raise and support armies' and 'to make rules for the government and regulation of the land and naval forces,' its control over the whole subject of the formation, organization, and government of the national armies, including therein the punishment of offenses committed by persons in the military service, would seem to be plenary. All we now affirm is that by the law to which we are referred, the thirtieth section of the Enrollment Act, no such exclusive jurisdiction is vested in the military tribunals mentioned. No public policy would have been subserved by investing them with such jurisdiction, and many reasons may be suggested against it."

It will be noted that the considerations upon which he based the conclusion that the military jurisdiction conferred was not exclusive as to a loyal state in time of war were what the article did not provide and what it did. It did not provide that "the offenses named shall not be amenable to punishment by the state courts," nor did it provide "that they shall be punished by the military courts." What it did provide was that they should be "punishable" thereby, which was merely "saying that they may be thus punished." But it did not follow, from the position that the jurisdiction in such a case was not exclusive, but concurrent with that of the civil courts, that the military authorities did not have the prior right in the exercise of jurisdiction. On the contrary, Mr. Justice Field recognized that they did have such prior right. He said:

"Persons in the military service could not have been taken from the army by process of the state courts without the consent of the military authorities; and therefore no impairment of its efficiency could arise from the retention of jurisdiction by the state courts to try the offenses. The answer of the military authorities to any such process would have been, 'We are empowered to try and punish the persons who have committed the offenses alleged, and we shall see that justice is done in the premises.' Interference with the army would thus have been impossible; and offenses committed by soldiers, discovered after the army had marched to a distance, when the production of evidence before a court-martial would have been difficult, if not impossible, or discovered after the war was over and the army disbanded would not go unpunished. Surely Congress could not have intended that in such cases the guilty should go free."

Indeed, it is an unescapable implication from the exception in article 59 of time of war from its requirement that the officers thereby referred to shall deliver an accused soldier to the civil authorities, if in their power to do so, and, if not, shall aid them in arresting him, thus limiting it to a time of peace, not only that the military authorities have the prior right to try him for the offense of which he is accused, but that they have the right to withhold him from the civil authorities and keep him in the army under all circumstances during the pendency of the war. It is clear, therefore, that under the ar-

titles of war as contained in section 1342, U. S. Rev. Stat., the civil authorities in time of war had no right to withhold a soldier accused of a crime from the military authorities, or to demand him from them in order to try him for an offense against the criminal laws of the land.

How does it stand under the act of August 29, 1916, in force at the time of the commission of the offense complained of? Thereunder article 96 takes the place of article 62 in the former statute, and article 74 of article 59. Though there is a change in verbiage, these new articles are substantially the same as the old ones. It is not important to take further note of them. The place of article 58 is taken by two sections in the new legislation. They are articles 92 and 93. Article 92 is in these words:

"Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial shall direct; but no person shall be tried by a court-martial for murder or rape committed within the geographical limits of the states of the Union and the District of Columbia in time of peace."

Article 93 is in these words:

"Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial may direct."

The offenses covered by article 93 are not limited to time of war, as in the former article 58, but the two covered by article 92 are. It will be noted, however, that in neither article is the provision that the offenses covered by them are "punishable" by court-martial; but in article 92 the provision is that the offender "shall suffer death or imprisonment for life as a court-martial may direct," and in article 93 that he "shall be punished as a court-martial may direct." Such language as this Mr. Justice Field in *Coleman v. Tennessee* seems to intimate might confer exclusive jurisdiction. It is therefore a question under the existing articles of war whether the military authorities do not in time of war have exclusive jurisdiction of the crime of murder, when committed by a person subject to military law, no matter where he may be when committed. It is not necessary that I take any position on this question. Assuming that the jurisdiction is no more exclusive than under article 58 of the former articles, the military authorities under article 92 have the preference in the exercise of jurisdiction.

It is urged on behalf of the commonwealth of Kentucky that this preference has been waived by the military authorities. The action relied on as amounting to such waiver is the delivery of the prisoner to the jailer of Campbell county by the sergeant of his company, who arrested him, the delivery by his captain of the rifle with which the killing was done to the civil authorities, to be used as evidence against him, and the presence of his captain and a major, probably his major, at the examining trial, and their statement to the county judge who held the trial, when asked if they wanted him and were going to interfere, "Let the civil court attend to it," all of which took place on the day of the killing. To this it is sufficient to say that, assuming

that the jurisdiction of the military authorities is not exclusive, but prior only, it has not been made to appear that these officers had any authority to waive the prior jurisdiction. The sergeant swears that he delivered the prisoner to the jailer to be held for the military authorities, and the action of the other officers was in view of the exercise of jurisdiction by the civil authorities, who had him in custody and after lapse of but little time for reflection. It cannot be said that presumptively they had authority to waive the prior jurisdiction of the military authorities, conceding that they intended to do so; and in the absence of a showing that they had such authority I cannot do otherwise than recognize such prior jurisdiction, when asserted by the commanding officer of the brigade to which the prisoner belongs.

My conclusion, therefore, is that if the Campbell circuit court will, in any contingency, have jurisdiction to try the prisoner under the indictment against him returned therein, it does not have such jurisdiction now, and that the military authorities are entitled to have him delivered to them, at least for trial under the charges pending before them against him.

An order will be entered to that effect upon the writ.

(c) *Executive Powers*

1. MARTIN v. MOTT.

(Supreme Court of the United States, 1827. 12 Wheat. 19, 6 L. Ed. 537.)

STORY, J., delivered the opinion of the court.

This is a writ of error to the judgment of the court for the trial of impeachments and the correction of errors of the State of New York, being the highest court of that State, and is brought here in virtue of the 25th section of the Judiciary Act of 1789 (1 Stats. at Large, 85,) c. 20. The original action was a replevin for certain goods and chattels, to which the original defendant put in an avowry, and to that avowry there was a demurrer, assigning nineteen distinct and special causes of demurrer. Upon a joinder in demurrer, the supreme court of the State gave judgment against the avowant; and that judgment was affirmed by the high court to which the present writ of error is addressed.

The avowry, in substance, asserts a justification of the taking of the goods and chattels to satisfy a fine and forfeiture imposed upon the original plaintiff by a court-martial, for a failure to enter the service of the United States as a militia-man, when thereto required by the President of the United States, in pursuance of the act of the 28th of February, 1795. It is argued that this avowry is defective, both in substance and form; and it will be our business to discuss the most material of these objections; and as to others, of which no particular notice is taken, it is to be understood that the court are of opinion that they are either unfounded in fact or in law, and do not require any separate examination.

For the more clear and exact consideration of the subject, it may be necessary to refer to the constitution of the United States, and some

of the provisions of the act of 1795. The constitution declares that congress shall have power "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions:" and also "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." In pursuance of this authority, the act of 1795 has provided, "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper." And like provisions are made for the other cases stated in the constitution. It has not been denied here, that the act of 1795 is within the constitutional authority of congress, or, that congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place. In our opinion there is no ground for a doubt on this point, even if it had been relied on, for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.

The power thus confided by congress to the President, is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militia-man who shall refuse to obey the orders of the President? We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which

the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If "the power of regulating the militia, and of commanding its services in times of insurrection and invasion, are, (as it has been emphatically said they are,) natural incidents to the duties of superintending the common defence, and of watching over the internal peace of the confederacy," (The Federalist, No. 29,) these powers must be so construed as to the modes of their exercise as not to defeat the great end in view. If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defence must finally rest upon his ability to establish the facts by competent proofs. Such a course would be subversive of all discipline, and expose the best disposed officers to the chances of ruinous litigation. Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment.

If we look at the language of the act of 1795, every conclusion drawn from the nature of the power itself, is strongly fortified. The words are, "whenever the United States shall be invaded, or be in imminent danger of invasion, &c., it shall be lawful for the President, &c., to call forth such number of the militia, &c., as he may judge necessary to repel such invasion." The power itself is confided to the Executive of the Union, to him who is, by the constitution, "the commander-in-chief of the militia, when called into the actual service of the United States," whose duty it is to "take care that the laws be faithfully executed," and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow, as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot therefore be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case, we are all of opinion that such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official

misconduct, if it should occur, is to be found in the constitution itself. In a free government, the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue, and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.

This doctrine has not been seriously contested upon the present occasion. It was indeed maintained and approved by the supreme court of New York, in the case of *Vanderheyden v. Young*, 11 Johns. (N. Y.) 150, where the reasons in support of it were most ably expounded by Mr. Justice Spencer, in delivering the opinion of the court.

But it is now contended, as it was contended in that case, that notwithstanding the judgment of the President is conclusive as to the existence of the exigency, and may be given in evidence as conclusive proof thereof, yet that the avowry is fatally defective, because it omits to aver that the fact did exist. The argument is, that the power confided to the President is a limited power, and can be exercised only in the cases pointed out in the statute, and therefore it is necessary to aver the facts which bring the exercise within the purview of the statute. In short, the same principles are sought to be applied to the delegation and exercise of this power intrusted to the Executive of the nation for great political purposes, as might be applied to the humblest officer in the government, acting upon the most narrow and special authority. It is the opinion of the court, that this objection cannot be maintained. When the President exercises an authority confided to him by law, the presumption is, that it is exercised in pursuance of law. Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and *a fortiori*, this presumption ought to be favorably applied to the chief magistrate of the Union. It is not necessary to aver, that the act which he may rightfully do, was so done. If the fact of the existence of the exigency were averred, it would be traversable, and of course might be passed upon by a jury; and thus the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury. This view of the objection is precisely the same which was acted upon by the supreme court of New York, in the case already referred to, and, in the opinion of this court, with entire legal correctness.

Another objection is, that the orders of the President are not set forth; nor is it averred that he issued any orders, but only that the governor of New York called out the militia upon the requisition of the President. The objection, so far as it proceeds upon a supposed difference between a requisition and an order, is untenable; for a requisition calling forth the militia is, in legal intendment, an order, and must be so interpreted in this avowry. The majority of the court understood and acted upon this sense, which is one of the acknowledged senses of the word, in *Houston v. Moore*, 5 Wheat. 1, 5 L. Ed. 19. It was unnecessary to set forth the orders of the President at large; it was quite sufficient to state that the call was in obedience to them. No private citizen is presumed to be conversant of the partic-

ulars of those orders; and if he were, he is not bound to set them forth in hæc verba.

The next objection is, that it does not sufficiently appear in the avowry, that the court-martial was a lawfully constituted court-martial, having jurisdiction of the offence at the time of passing its sentence against the original plaintiff.

Various grounds have been assigned in support of this objection. In the first place, it is said, that the original plaintiff was never employed in the service of the United States, but refused to enter that service, and that, consequently, he was not liable to the rules and articles of war, or to be tried for the offence by any court-martial organized under the authority of the United States. The case of *Houston v. Moore*, 5 Wheat. 1, 5 L. Ed. 19, affords a conclusive answer to this suggestion. It was decided in that case, that although a militia man, who refused to obey the orders of the President calling him into the public service, was not, in the sense of the act of 1795, "employed in the service of the United States," so as to be subject to the rules and articles of war; yet that he was liable to be tried for the offence under the 5th section of the same act, by a court-martial called under the authority of the United States. The great doubt in that case was, whether the delinquent was liable to be tried for the offence by a court-martial organized under state authority. * * *

Another objection to the proceedings of the court-martial is, that they took place, and the sentence was given, three years and more after the war was concluded, and in a time of profound peace. But the opinion of this court is, that a court-martial, regularly called under the act of 1795, does not expire with the end of a war then existing, nor is its jurisdiction to try these offences in any shape dependent upon the fact of war or peace. The act of 1795 is not confined in its operation to cases of refusal to obey the orders of the President in times of public war. On the contrary, that act authorizes the President to call forth the militia to suppress insurrections, and to enforce the laws of the United States in times of peace. And courts-martial are, under the 5th section of the act, entitled to take cognizance of, and to punish delinquencies in such cases, as well as in cases where the object is to repel invasion in times of war. It would be a strained construction of the act to limit the authority of the court to the mere time of the existence of the particular exigency, when it might be thereby unable to take cognizance of and decide upon a single offence. It is sufficient for us to say, that there is no such limitation in the act itself. * * *

Upon the whole, it is the opinion of the court that the judgment of the court for the trial of impeachments and the correction of errors ought to be reversed; and that the cause be remanded to the same court, with directions to cause a judgment to be entered upon the pleadings in favor of the avowant.

2. UNITED STATES v. ELIASON.

(Supreme Court of the United States, 1842. 16 Pet. 291, 10 L. Ed. 968.)

DANIEL, J., delivered the opinion of the court.

Upon a writ of error to the circuit court of Washington county, in the District of Columbia.

On the 16th day of February, 1839, the plaintiffs instituted an action of assumpsit in the circuit court of Washington county, against William A. Eliason, for the balance of \$2,600.75, charged against him on the books of the treasury as disbursing officer at Fortress Calhoun, between the dates of the 7th of November, 1834, and the 10th of September, 1838.

The defendant, Eliason, appeared to the suit, and filed the plea of non assumpsit, upon which issue was joined; but having died before the cause came to trial, the defendant in error, as administratrix of the decedent, was made a party defendant, and the cause regularly progressed to trial upon the issue made up between the original parties. Upon the trial before the circuit court, the following case was agreed between the parties by their attorneys, to be subject to the opinion of the court, as to the law upon the same, namely: On the trial of the above cause, the plaintiffs, to maintain the issue on their part joined, offered in evidence the transcripts from the treasury department, (which are found in pages 12 to 16 of the Record,) and the said defendant then offered evidence to show that the said intestate was a captain in the United States corps of engineers, and as such was ordered to take charge and superintend the works on Fortress Calhoun, and took charge of, and continued the said work from the 7th November, 1834, to the 10th September, 1838; and further offered in evidence, the general regulations of the war department, as follow, art. 67, § 14: "Where there is no agent for fortifications, the superintending officer shall perform the duties of agent; while performing such duties, the rules and regulations for the government of such agents shall be applicable to him; and as compensation for the performance of that extra duty, he shall be allowed, for moneys expended by him, in the construction of fortifications, at the rate of \$2 per diem, during the continuance of such disbursements, provided the whole amount of emolument shall not exceed two and a half per centum on the sum expended." And, further, that the said intestate, while thus employed, disbursed \$214,392.61; that he was also directed to take charge of, and superintend the removal of a light-house into Fortress Calhoun, in which service he disbursed \$1,143.13; and, further, that he was charged with the disbursement of, and did disburse, the sum of \$1,891.43, for incidental expenses of fortifications beginning in the year 1830, and that he purchased for the use of the engineer department a set of instruments and case, and the department allowed him for the instruments, but refused to allow him for the case, amounting to \$10; and, further, that the pay and emoluments of the said intestate had been stopped by the government of the United States, from the 31st December, 1838, to the 15th day of June, 1839, amounting to \$1,014.95, and the defendant then claimed credit

For compensation for disbursing money on account of Fortress Calhoun from 7th November, 1834, to 10th September, 1838, up to which time he was in charge of said work, inclusive at \$2 per day	\$2,816 00
Of which this amount only had been allowed.....	234 00
Balance	2,582 00
For money disbursed on account for removing lighthouse, &c.....	21 64
For money disbursed for incidental expenses of fortifications.....	46 95
For case of instruments.....	10 00
For pay and emoluments, (mark d B.,) copied at page 29.....	1,014 95
	\$3,689 26
For balance of account rendered 29th March, 1839.....	74 79
	\$3,764 05

And further offered evidence that all the claims above stated, except that for pay and emoluments, had been submitted to, and rejected by, the accounting officer of the treasury department, and further produced and offered in evidence the following statement of the state of the appropriations under which the disbursements were made.

The plaintiffs offered in evidence the regulations of the war department of the 14th of March, 1835: "The proviso in the act of congress, passed March 3, 1835, (4 Stats. at Large, 753,) entitled 'An act making additional appropriations for the Delaware Breakwater, and for certain harbors, and removing obstructions in and at the mouth of certain rivers, for the year 1835;' and which prohibits the allowance of extra compensation to officers of the army, has been submitted to the attorney-general for his opinion, and that officer has decided that it extends to, and prohibits the allowance of all extra compensation of any kind whatever, for which provision is not made by law. Hereafter, therefore, no extra compensation will be allowed." And upon the foregoing statements it is submitted to the court to say whether the defendant's intestate was entitled by law to the allowances claimed by him for disbursements as above stated. If the court is of opinion that he is so entitled, then the judgment to be for the defendant; if otherwise, for the plaintiffs, for the amount appearing due by the transcript.

F. S. Key, for the United States,

Jos. H. Bradley, for defendant.

Upon the statement of facts agreed, as above mentioned, the circuit court pronounced the following opinion and judgment: "And thereupon, upon the full consideration of the case stated as aforesaid, the said court is of opinion, that the proviso in the act of the 3d of March, 1835, c. 303, is only applicable to the disbursing of public money, appropriated by law during the session of congress in which that act was passed; and it appearing therein, to the satisfaction of the court, that no part of the money so as aforesaid disbursed by the said defendant, was appropriated at the said session of congress; the court is also of opinion that the said intestate was entitled to the allowances claimed by him for the disbursements as above stated, and do thereupon order the judgment to be entered for the said defendant." To this opinion an exception was taken by the plaintiffs, which was sealed by the court, and made a part of the record. * * *

In considering the exception taken to the opinion of the circuit court, in relation to the act of Congress of March 3, 1835, the order of the war department of March 13th of the same year, and the rights of the plaintiffs and of the defendant, as connected therewith, this court have no difficulty in pronouncing the opinion and decision of the circuit court as altogether untenable. The power of the executive to establish rules and regulations for the government of the army, is undoubted. The very appeal made by the defendant to the 14th section of the 67th article of the Army Regulations, is a recognition of this right. The power to establish, implies, necessarily, the power to modify or repeal, or to create anew.

The secretary of war is the regular constitutional organ of the President for the administration of the military establishment of the nation; and rules and orders publicly promulged through him must be received as the acts of the executive, and, as such, be binding upon all within the sphere of his legal and constitutional authority.

Such regulations cannot be questioned or defied because they may be thought unwise or mistaken. The right of so considering and treating the authority of the executive, vested as it is with the command of the military and naval forces, could not be intrusted to officers of any grade inferior to the commander-in-chief; its consequences, if tolerated, would be a complete disorganization of both the army and navy. In the present instance, the order was adopted by the proper authority, and by the same authority promulged to every officer through the regular official organ; and the question propounded to the circuit court was neither more nor less than this, whether a subordinate officer of the army, insisting upon a prior regulation, which he thinks either is or ought to be in force, shall obtain from the government emoluments which a subsequent order from his superior had warned him that it was not in his power to require? This question can need no argument for its solution. This court are, therefore, of opinion that the circuit court have erred in allowing to Captain Eliason a per diem, as disbursing officer at Fortress Calhoun, subsequently to the 3d day of March, 1835. Under the 14th section of the 67th article of the Army Regulations, they do, therefore, reverse the decision of the circuit court, and direct that a judgment be entered for the plaintiffs for the sum of \$2,600.75, as claimed by them, together with their costs.

3. FLEMING v. PAGE.

(Supreme Court of the United States, 1849. 9 How. 603, 13 L. Ed. 276.)

Certificate of division of opinion by the judges of the circuit court of the United States for the eastern district of Pennsylvania.

The question was as follows:

"Whether Tampico, in the year 1847, while in the military occupation of the forces of the United States, ceased to be a foreign country, within the meaning of the first section of the act of congress passed 30th July, 1846, entitled: 'An act reducing the duty on imports, and for other purposes;' so that goods, wares, and merchandise

of the produce, growth, and manufacture of Mexico, or any part thereof, imported into the port of Philadelphia from Tampico, during said military occupation, were not subject to the payment of the duties prescribed by the said act, but entitled to be entered free of duty as from a domestic port."

TANEY, C. J., delivered the opinion of the court.

The question certified by the circuit court turns upon the construction of the act of congress of July 30, 1846, (9 Stats. at Large, 42.) The duties levied upon the cargo of the schooner Catharine were the duties imposed by this law upon goods imported from a foreign country. And if at the time of this shipment, Tampico was not a foreign port within the meaning of the act of congress, then the duties were illegally charged, and, having been paid under protest, the plaintiffs would be entitled to recover in this action the amount exacted by the collector.

The port of Tampico, at which the goods were shipped, and the Mexican State of Tamaulipas, in which it is situated, were undoubtedly at the time of the shipment, subject to the sovereignty and dominion of the United States. The Mexican authorities had been driven out, or had submitted to our army and navy; and the country was in the exclusive and firm possession of the United States, and governed by its military authorities, acting under the orders of the President. But it does not follow that it was a part of the United States, or that it ceased to be a foreign country, in the sense in which these words are used in the acts of congress.

The country in question had been conquered in war. But the genius and character of our institutions are peaceful, and the power to declare war was not conferred upon congress for the purposes of aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens.

A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war (9 Stats. at Large, 9,) imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.

It is true that, when Tampico had been captured, and the state of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. For, by the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries.

But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest, holds it according to its own institutions and laws. And the relation in which the port of Tampico stood to the United States, while it was occupied by their arms, did not depend upon the laws of nations, but upon our own constitution and acts of congress. The power of the President under which Tampico and the State of Tamaulipas were conquered and held in subjection, was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his government. And the country from which these goods were imported, was invaded and subdued, and occupied as the territory of a foreign hostile nation, as a portion of Mexico, and was held in possession in order to distress and harass the enemy. While it was occupied by our troops, they were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy, when he surrenders to a force which he is unable to resist. But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varying incidents of war, and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States, as previously established by the political authorities of the government, was still foreign; nor did our laws extend over it. Tampico was, therefore, a foreign port when this shipment was made.

Again, there was no act of congress establishing a custom-house at Tampico, nor authorizing the appointment of a collector; and, consequently, there was no officer of the United States authorized by law to grant the clearance and authenticate the coasting manifest of the cargo, in the manner directed by law, where the voyage is from one port of the United States to another. The person who acted in the character of collector in this instance, acted as such under the authority of the military commander, and in obedience to his orders; and the duties he exacted, and the regulations he adopted, were not those prescribed by law, but by the President in his character of commander-in-chief. The custom-house was established in an enemy's country, as one of the weapons of war. It was established, not for the purpose of giving to the people of Tamaulipas the benefits of,

commerce with the United States, or with other countries, but as a measure of hostility, and as a part of the military operations in Mexico; it was a mode of exacting contributions from the enemy to support our army, and intended also to cripple the resources of Mexico, and make it feel the evils and burdens of the war. The duties required to be paid were regulated with this view, and were nothing more than contributions levied upon the enemy, which the usages of war justify when an army is operating in the enemy's country. The permit and coasting manifest granted by an officer thus appointed, and thus controlled by military authority, could not be recognized in any port of the United States as the documents required by the act of congress when the vessel is engaged in the coasting trade, nor could they exempt the cargo from the payment of duties.

This construction of the revenue laws has been uniformly given by the administrative department of the government in every case that has come before it. And it has, indeed, been given in cases where there appears to have been stronger ground for regarding the place of shipment as a domestic port. For, after Florida had been ceded to the United States, and the forces of the United States had taken possession of Pensacola, it was decided by the treasury department, that goods imported from Pensacola before an act of congress was passed erecting it into a collection district, and authorizing the appointment of a collector, were liable to duty. That is, that, although Florida had, by cession, actually become a part of the United States, and was in our possession, yet, under our revenue laws, its ports must be regarded as foreign until they were established as domestic, by act of congress; and it appears that this decision was sanctioned at the time by the attorney-general of the United States, the law officer of the government. And, although not so directly applicable to the case before us, yet the decisions of the treasury department in relation to Amelia Island, and certain ports in Louisiana, after that province had been ceded to the United States, were both made upon the same grounds. And in the latter case, after a custom-house had been established by law (2 Stats. at Large, 418) at New Orleans, the collector at that place was instructed to regard as foreign ports Baton Rouge and other settlements still in the possession of Spain, whether on the Mississippi, Iberville, or the sea-coast. The department in no instance that we are aware of, since the establishment of the government, has ever recognized a place in a newly acquired country as a domestic port, from which the coasting trade might be carried on, unless it had been previously made so by act of congress.

The principle thus adopted and acted upon by the executive department of the government, has been sanctioned by the decisions in this court and the circuit courts whenever the question came before them. We do not propose to comment upon the different cases cited in the argument. It is sufficient to say that there is no discrepancy between them. And all of them, so far as they apply, maintain that, under our revenue laws, every port is regarded as a foreign one, unless the custom-house from which the vessel clears, is within a collection district established by act of congress, and the officers granting

the clearance exercise their functions under the authority and control of the laws of the United States.

In the view we have taken of this question, it is unnecessary to notice particularly the passages from eminent writers on the laws of nations, which were brought forward in the argument. They speak altogether of the rights which a sovereign acquires, and the powers he may exercise in a conquered country, and they do not bear upon the question we are considering. For, in this country, the sovereignty of the United States resides in the people of the several States, and they act through their representatives, according to the delegation and distribution of powers contained in the constitution. And the constituted authorities to whom the power of making war and concluding peace is confided, and of determining, whether a conquered country shall be permanently retained or not, neither claimed nor exercised any rights or powers in relation to the territory in question, but the rights of war. After it was subdued, it was uniformly treated as an enemy's country, and restored to the possession of the Mexican authorities when peace was concluded. And, certainly, its subjugation did not compel the United States, while they held it, to regard it as a part of their dominions, nor to give to it any form of civil government, nor to extend to it our laws.

Neither is it necessary to examine the English decisions which have been referred to by counsel. It is true that most of the States have adopted the principles of English jurisprudence, so far as it concerns private and individual rights. And when such rights are in question, we habitually refer to the English decisions, not only with respect, but in many cases as authoritative. But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own constitution and form of government must be our only guide. And we are entirely satisfied that, under the constitution and laws of the United States, Tampico was a foreign port, within the meaning of the act of 1846, when these goods were shipped, and that the cargoes were liable to the duty charged upon them. And we shall certify accordingly to the circuit court.

McLEAN, J., dissented.

4. CROSS v. HARRISON.

(Supreme Court of the United States, 1853. 16 How. 164, 14 L. Ed. 889.)

WAYNE, J., delivered the opinion of the court.

This case comes up, by writ of error, from the circuit court of the United States for the southern district of New York.

It was an action brought by Cross, Hobson, and Company, against Harrison, for the return of duties alleged to be illegally exacted by

Harrison whilst he was acting as collector of the customs at the port of San Francisco, in California. The claim covered various amounts of money which were paid at intervals between the 3d day of February, 1848, and the 13th of November, 1849. The first of these dates was that of the treaty of peace between the United States and Mexico, and the latter when Mr. Collier, a person who had been regularly appointed collector at that port, entered upon the performance of the duties of his office. During the whole of this period it was alleged by the plaintiffs, that there existed no legal authority to receive or collect any duty whatever accruing upon goods imported from foreign countries.

The period of time above mentioned was subdivided by the plaintiffs in the prayers which they made to the court below, into two portions, to each of which they supposed that different rules of law attached. The three periods may be stated as follows:

3d of February, 1848, the date of the treaty of peace between the United States and Mexico. 9 Stats. at Large, 922 to 943.

3d of March, 1849, when the act of congress was passed, including San Francisco within one of the collection districts of the United States. And

13th of November, 1849, when Collector Collier entered upon the duties of his office. * * *

The purpose of the suit is to recover from the defendant certain tonnage duties and imposts which were paid to him by the plaintiffs upon ships which had arrived in San Francisco, and upon foreign merchandise landed there from them, between the 3d February, 1848, and the 13th November, 1849. Harrison had been appointed collector for the port of San Francisco by Colonel Mason, military governor of California. He told the plaintiffs, officially, that he would not permit them to land their goods without the payment of duties; stating if they attempted to do so, without having made an entry of them, that they would be seized and forfeited. He placed an inspector of the customs on board of the vessels of the plaintiffs, to prevent any merchandise from being landed from them without permits and entries, and when they complained that the duties which they were required to pay were illegal exactions, which they protested against, the collector refused to receive the duties under protest, and told the plaintiffs that they might enter their ships at some other port in the United States, and then discharge their goods at San Francisco. That he considered San Francisco a port in the United States at which foreign goods could not be landed without the payment of duties. It is as well to remark here * * * that the duties for which the plaintiffs sue were paid by them between the 3d February, 1848, and the 12th November, 1849. They were paid, however, until some time in the fall of 1848, at the rate of the war tariff; which had been established early in the year before by the direction of the President of the United States.

The authority for that purpose given to the commander-in-chief of our naval force on that station, was to establish port regulations, to prescribe the conditions upon which American and foreign vessels were to be admitted into the ports of California, and to regulate import duties. That war tariff, however, was abandoned as soon as the military

governor had received from Washington information of the exchange and ratification of the treaty with Mexico, and duties were afterwards levied in conformity with such as congress had imposed upon foreign merchandise imported into the other ports of the United States, Upper California having been ceded by the treaty to the United States. This last was done with the assent of the executive of the United States, or without any interference to prevent it. Indeed, from the letter of the then secretary of state, and from that of the secretary of the treasury, we cannot doubt that the action of the military governor of California was recognized as allowable and lawful by Mr. Polk and his cabinet. We think it was a rightful and correct recognition under all the circumstances, and when we say rightful, we mean that it was constitutional, although congress had not passed an act to extend the collection of tonnage and import duties to the ports of California.

California, or the port of San Francisco, had been conquered by the arms of the United States as early as 1846. Shortly afterward, the United States had military possession of all of Upper California. Early in 1847, the President, as constitutional commander-in-chief of the army and navy, authorized the military and naval commander of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country, and to impose duties on imports and tonnage as military contributions for the support of the government, and of the army which had the conquest in possession. * * * No one can doubt that these orders of the President, and the action of our army and navy commander in California, in conformity with them, was according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of a treaty of peace. Such would be the case upon general principles in respect to war and peace between nations. In this instance it is recognized by the treaty itself. Nothing is stipulated in that treaty to be binding upon the parties to it, or from the date of the signature of the treaty, but that commissioners should be appointed by the general-in-chief of the forces of the United States, with such as might be appointed by the Mexican government, to make a provisional suspension of hostilities, that in the places occupied by our arms, constitutional order might be reestablished as regards the political, administrative, and judicial branches in those places, so far as that might be permitted by the circumstances of military occupation. All else was contingent until the ratifications of the treaty were exchanged, which was done on the 30th of May, 1848, at Queretaro; and there is in the 3d article of the treaty a full recognition by Mexico of the belligerent rights exercised by the United States during the war in its ports which had been conquered. In that article, besides other things provided for, it was stipulated that the United States, upon the ratifications of the treaty by the two republics, should dispatch orders to all persons in charge of the custom-houses at all ports occupied by the forces of the United States, to deliver possession of the same to persons authorized by Mexico to receive them, together with all bonds and evidences of debts for duties on importations and exportations not yet fallen due, and that an exact account should be made out, showing the entire amount of all duties on imports and exports collected at such custom-

houses or elsewhere in Mexico by the authority of the United States after the ratification of the treaty by Mexico, with the cost of collection, all of which was to be paid to the Mexican government, at the city of Mexico, within three months after the exchange of ratifications, subject to a deduction of what had been the cost of collection.

The plaintiffs therefore can have no right to the return of any moneys paid by them as duties on foreign merchandise in San Francisco up to that date. Until that time California had not been ceded, in fact, to the United States, but it was a conquered territory, within which the United States were exercising belligerent rights, and whatever sums were received for duties upon foreign merchandises, they were paid under them.

But after the ratification of the treaty, California became a part of the United States, or a ceded, conquered territory. Our inquiry here is to be, whether or not the cession gave any right to the plaintiffs to have the duties restored to them, which they may have paid between the ratifications and exchange of the treaty and the notification of that fact by our government to the military governor of California. It was not received by him until two months after the ratification, and not then with any instructions or even remote intimation from the President that the civil and military government, which had been instituted during the war, was discontinued. Up to that time, whether such an intimation had or had not been given, duties had been collected under the war tariff, strictly in conformity with the instructions which had been received from Washington.

It will certainly not be denied that those instructions were binding upon those who administered the civil government in California, until they had notice from their own government that a peace had been finally concluded. Or that those who were locally within its jurisdiction, or who had property there, were not bound to comply with those regulations of the government, which its functionaries were ordered to execute. Or that any one could claim a right to introduce into the territory of that government foreign merchandise, without the payment of duties which had been originally imposed under belligerent rights, because the territory had been ceded by the original possessor and enemy to the conqueror. Or that the mere fact of a territory having been ceded by one sovereignty to another, opens it to a free commercial intercourse with all the world, as a matter of course, until the new possessor has legislated some terms upon which that may be done. There is no such commercial liberty known among nations, and the attempt to introduce it in this instance is resisted by all of those considerations which have made foreign commerce between nations conventional. "The treaty that gives the right of commerce, is the measure and rule of that right." Vattel, c. 8, § 93. The plaintiffs in this case could claim no privilege for the introduction of their goods into San Francisco between the ratifications of the treaty with Mexico and the official annunciation of it to the civil government in California, other than such as that government permitted under the instructions of the government of the United States.

We must consider them as having paid the duties upon their impor-

tations voluntarily, notwithstanding that they protested against the right of the collector to exact them. Their protest was made from a misconception of the principles applicable to the circumstances under which those duties were claimed, and from their misapprehension of what were the commercial consequences resulting from the treaty of peace with Mexico and the cession of California to the United States. That treaty gave them no right to carry foreign goods there upon which duties had not been paid in one of our ports of entry. The best test of the correctness of what has just been said is this; that if such goods had been landed there duty free, they could not have been shipped to any other port in the United States without being liable to pay duty.

Having considered and denied the claim of the plaintiffs to a restoration of the duties paid by them from the date of the treaty up to the time when official notice of its ratification and exchange were received in California, we pass on to the examination of their claim from that time until the revenue system in respect to tonnage and import duties had been put into practical operation in California, under the act of congress passed for that purpose. The ratification of the treaty of peace was proclaimed in California, by Colonel Mason, on the 7th of August, 1848. Up to this time it must be remembered that Captain Folsom, of the quartermaster's department of the army, had been the collector of duties under the war tariff. On the 9th of August, he was informed by Lieutenant Halleck, of the engineer corps, who was the secretary of state of the civil government of California, that he would be relieved as soon as a suitable citizen could be found for his successor. He was also told that "the tariff of duties for the collection of military contributions was immediately to cease, and that the revenue laws and tariff of the United States will be substituted in its place." The view taken by Governor Mason, of his position, has been given in our statement. The result was to continue the existing government, as he had not received from Washington definite instructions in reference to the existing state of things in California.

His position was unlike any thing that had preceded it in the history of our country. The view taken of it by himself has been given in the statement in the beginning of this opinion. It was not without its difficulties, both as regards the principle upon which he should act, and the actual state of affairs in California. He knew that the Mexican inhabitants of it had been remitted by the treaty of peace to those municipal laws and usages which prevailed among them before the territory had been ceded to the United States, but that a state of things and population had grown up during the war, and after the treaty of peace, which made some other authority necessary to maintain the rights of the ceded inhabitants and of immigrants, from misrule and violence. He may not have comprehended fully the principle applicable to what he might rightly do in such a case, but he felt rightly and acted accordingly. He determined, in the absence of all instruction, to maintain the existing government. The territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the constitution, by which power had been given to congress to dispose of and make all needful rules and

regulations respecting the territory or other property belonging to the United States, with the power also to admit new States into this Union, with only such limitations as are expressed in the section in which this power is given. The government, of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the government. And the more so as it was continued until the people of the territory met in convention to form a state government, which was subsequently recognized by congress under its power to admit new States into the Union. * * *

We shall direct the judgment to be affirmed.

5. THE GRAPESHOT.

(Supreme Court of the United States, 1869. 9 Wall. 129. 19 L. Ed. 651.)

This case, which in its original form, was a libel in the District Court of Louisiana, on a bottomry bond, and, as such, involved nothing but the correct presentation of the principles of maritime law relating to that matter, and the examination of a good deal of contradictory evidence, to see how far the particular case came within them, presented subsequently, and in consequence of the rebellion and the occupation by our army of the mere city of New Orleans, while the region surrounding it generally was still held by the Confederate powers and troops, a great question of constitutional law, the question namely, how far, with that clause of the Constitution in force which declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish," the President could establish a Provisional Court, and how far Congress, on the suppression of the rebellion, could, by its enactment, validate the doings of such a court, transfer its judgments, and make them judgments of the now re-established former and proper Federal courts, from one of which, the Circuit Court of the United States for the District of Louisiana, the cause purported to be brought here.

The CHIEF JUSTICE delivered the opinion of the court.

The first question to be examined in this case is one of jurisdiction.

The suit, shown by the record, was originally instituted in the District Court of the United States for the District of Louisiana, where a decree was rendered for the libellant. From this decree an appeal was

taken to the Circuit Court, where the case was pending, when, in 1861, the proceedings of the court were interrupted by the civil war. Louisiana had become involved in the rebellion, and the courts and officers of the United States were excluded from its limits. In 1862, however, the National authority had been partially re-established in the State, though still liable to be overthrown by the vicissitudes of war. The troops of the Union occupied New Orleans, and held military possession of the city and such other portions of the State as had submitted to the General government. The nature of this occupation and possession was fully explained in the case of *The Venice*.

Whilst it continued, on the 20th of October, 1862, President Lincoln, by proclamation, instituted a Provisional Court for the State of Louisiana, with authority, among other powers, to hear, try, and determine all causes in admiralty. Subsequently, by consent of parties, this cause was transferred into the Provisional Court thus constituted, and was heard, and a decree was again rendered in favor of the libellants. Upon the restoration of civil authority in the State, the Provisional Court, limited in duration, according to the terms of the proclamation, by that event, ceased to exist.

On the 28th of July, 1866, Congress enacted that all suits, causes, and proceedings in the Provisional Court, proper for the jurisdiction of the Circuit Court of the United States for the Eastern District of Louisiana, should be transferred to that court, and heard and determined therein; and that all judgments, orders, and decrees of the Provisional Court in causes transferred to the Circuit Court should at once become the orders, judgments, and decrees of that court, and might be enforced, pleaded, and proved accordingly.

It is questioned upon these facts whether the establishment by the President of a Provisional Court was warranted by the Constitution.

That the late rebellion, when it assumed the character of civil war, was attended by the general incidents of a regular war, has been so frequently declared here that nothing further need be said on that point.

The object of the National government, indeed, was neither conquest nor subjugation, but the overthrow of the insurgent organization, the suppression of insurrection, and the re-establishment of legitimate authority. But in the attainment of these ends, through military force, it became the duty of the National government, wherever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the National forces, to provide as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice.

The duty of the National government, in this respect, was no other than that which devolves upon the government of a regular belligerent occupying, during war, the territory of another belligerent. It was a military duty, to be performed by the President as commander-in-chief, and intrusted as such with the direction of the military force by which the occupation was held.

What that duty is, when the territory occupied by the National forces is foreign territory, has been declared by this court in several cases arising from such occupation during the late war with Mex-

ico. In the case of *Leitensdorfer v. Webb*, 20 How. 176, 15 L. Ed. 891, the authority of the officer holding possession for the United States to establish a provisional government was sustained; and the reasons by which that judgment was supported, apply directly to the establishment of the Provisional Court in Louisiana. The cases of *Jecker v. Montgomery*, 13 How. 498, 14 L. Ed. 240, and *Cross v. Harrison*, 16 How. 164, 14 L. Ed. 889, may also be cited in illustration of the principles applicable to military occupation.

We have no doubt that the Provisional Court of Louisiana was properly established by the President in the exercise of his constitutional authority during war; or that Congress had power, upon the close of the war, and the dissolution of the Provisional Court, to provide for the transfer of cases pending in that Court, and of its judgments and decrees, to the proper courts of the United States.

6. HAMILTON v. DILLIN.

(Supreme Court of the United States, 1874. 21 Wall. 73, 22 L. Ed. 528.)

Error to the Circuit Court for the Middle District of Tennessee.

Mr. Justice BRADLEY delivered the opinion of the court.

There can be no question that the condition requiring the payment of four cents per pound for a permit to purchase cotton in, and transport it from, the insurrectionary States during the late civil war, was competent to the war power of the United States government to impose. The war was a public one. The government in prosecuting it had at least all the rights which any belligerent power has when prosecuting a public war. That war was itself a suspension of commercial intercourse between the opposing sections of the country. No cotton or other merchandise could be lawfully purchased in the insurrectionary States and transported to the loyal States without the consent of the government. If such a course of dealing were to be permitted at all, it would necessarily be upon such conditions as the government chose to prescribe. The war power vested in the government implied all this without any specific mention of it in the Constitution.

In England this power to remit the restrictions on commercial intercourse with a hostile nation is exercised by the crown. Lord Stowell says: "By the law and constitution of this country, the sovereign alone has the power of declaring war and peace. He alone, therefore, who has the power of entirely removing a state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war." *The Hoop*, 1 Robinson, 199. Bynhershoeck says: "It is in all cases the act of the sovereign." *Questionum Juris Publici*, bk. 1, c. 3. By the Constitution of the United States the power to declare war is confided to Congress. The executive power and the command of the military and naval forces is vested in the President. Whether, in the absence of Congressional action, the power of permitting partial intercourse with a public enemy may or may not be exercised by the President alone, who is constitutionally invested with the entire charge of

hostile operations, it is not now necessary to decide, although it would seem that little doubt could be raised on the subject. In the case of *Cross v. Harrison*, 16 How. 164, 190, 14 L. Ed. 889, it was held that the President, as commander-in-chief, had power to form a temporary civil government for California as a conquered country, and to impose duties on imports and tonnage for the support of the government and for aiding to sustain the burdens of the war, which were held valid until Congress saw fit to supersede them; and an action brought to recover back duties paid under such regulation was adjudged to be not maintainable. The same views were held in *Leitensdorfer et al. v. Webb*, 20 How. 176, 15 L. Ed. 891, in reference to the establishment of a provisional government in New Mexico, in the war with Mexico in 1846, and were reiterated by this court in the case of *The Grapeshot*, 9 Wall. 129, 19 L. Ed. 651.

But without pursuing this inquiry, and whatever view may be taken as to the precise boundary between the legislative and executive powers in reference to the question under consideration, there is no doubt that a concurrence of both affords ample foundation for any regulations on the subject.

Our first inquiry, therefore, will be, whether the action of the executive was authorized, or, if not originally authorized, was confirmed by Congress.

By the act of July 13th, 1861, (section 5, 12 Stat. at Large, 257,) the President was authorized, after certain preliminary measures for suppressing the insurrection, to declare by proclamation what States and parts of States were in a state of insurrection against the United States; "and thereupon," the act proceeds to say, "all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue; and all goods, &c., coming from said States or section into the other parts of the United States, and all proceeding to such States or section, by land or water, shall, together with the vessel or vehicle, &c., be forfeited to the United States: Provided, however, that the President may, in his discretion, license and permit commercial intercourse with any such part of said States or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury."

In pursuance of this act the President, on the 16th of August, 1861, issued a proclamation, (12 Stat. at Large, 1262,) declaring that the inhabitants of certain States (including Tennessee) were in a state of insurrection against the United States, and that all commercial intercourse between them and the citizens of other States was unlawful, and that all goods, &c., coming from said States without the special license and permission of the President, through the Secretary of the Treasury, or proceeding to any of said States, &c., would be forfeited, &c. This proclamation excepted from its operation, amongst other things, such parts of the enumerated States as might maintain a loyal

adhesion to the Union and Constitution, or might be from time to time occupied and controlled by forces of the United States. A subsequent proclamation, issued April 2d, 1863 (13 Id. 731,) abrogated the said exception as embarrassing "to the due enforcement of said act of July 13th, 1861, and the proper regulation of the commercial intercourse authorized by said act;" such abrogation, however, not extending to West Virginia, or the ports of New Orleans, Key West, Port Royal, or Beaufort, in South Carolina.

Under, and in supposed pursuance of, this act and these proclamations, the license of the President and the trade regulations of the Secretary of the Treasury were made under which the plaintiffs purchased and shipped the cotton in question. These public acts of the executive department must be construed as one system. The license of the President to hold commercial intercourse cannot be separated, in determining this controversy, from the treasury regulations which were adopted for the government of that intercourse. There is an evident effort on the part of the plaintiffs to separate them; and it is worthy of passing observation that the actual license of the President was not put in evidence. But a public act of the government of such importance may receive the judicial notice of the court; and availing ourselves of that right we find that the regulations referred to as adopted September 11th, 1863, are revised regulations, expressly approved by the President, and supplementary to previous regulations adopted March 31st, 1863, to which the President had attached the license of same date, under which the entire authority to pursue the trade in this cotton arose. This license, after reciting the act of Congress of July 13th, 1861, so far as relates to commercial intercourse, proceeds as follows: "And whereas it appears that a partial restoration of such intercourse between the inhabitants of sundry places and sections heretofore declared in insurrection, in pursuance of said act, and the citizens of the rest of the United States, will favorably affect the public interests: Now, therefore, I, Abraham Lincoln, President of the United States, exercising the authority and discretion confided to me by the said act of Congress, do hereby license and permit such commercial intercourse between the citizens of loyal States and the inhabitants of such insurrectionary States in the cases and under the restrictions described and expressed in the regulations prescribed by the Secretary of the Treasury, bearing even date with these presents, or in other such regulations as he may hereafter, with my approval, prescribe."

It is clear, therefore, that the license to trade given by the President was a conditional one, requiring a full compliance with the regulations adopted by the Secretary of the Treasury, between whom and the President, as would be supposed, there was entire harmony and even unity of action.

The question then comes to this: Under the supposed authority of the act of July 13th, 1861, the President and Secretary of the Treasury authorized and licensed cotton to be purchased in and transported from insurrectionary districts, on condition that the parties availing themselves of the license should pay to the government four cents per pound and all other fees. If we might offer a conjecture as to the

motive for this regulation, it may have been this, namely: that such a bonus would help to counterbalance, in favor of our government, any benefit which the enemy might derive from a sale of the cotton instead of its destruction. But the actual motive is not material. The government chose to impose this condition. It supposed it had a right to do so. No one was bound to accept it. No one was compelled to engage in the trade. Not the least compulsion was exercised. The plaintiffs endeavor to put the case as if they were obliged to pay this exaction to save their property. This is not a true view of it. It is admitted that the property was purchased under the license. If so, it was also purchased in view of the regulations to which the license referred. The regulations themselves show that the permit to purchase and the permit to export were correlative to each other; that no one was permitted to purchase who did not enter into bond to pay all fees required by the regulations, amongst which the charge of four cents per pound on cotton was expressly inserted. In short, the permit to purchase and export constituted substantially one permit, and that was granted only on the condition of paying the prescribed fees, as before stated. The clearance of particular lots or cargoes required afterwards, when the property was actually shipped, was necessary to show that the stipulated conditions had been complied with, and that the particular articles specified were free for transportation. The whole series of acts constituted, so far as the right to trade and transport was concerned, but one transaction; a conditional permission given on the part of the government, and the acceptance of and compliance with that condition on the part of the trader.

The position in which the plaintiffs put themselves, therefore, was an entirely voluntary one. They have no right now to say: "It is true we purchased the cotton under a license which required us to pay a certain bonus; but having purchased it, we were entitled to repudiate the condition, although we had no right to make the purchase except by virtue of the license." Much less have they now a right to say, after having complied with the condition without murmur or objection, that the bonus was extorted from them by compulsion.

Whether, therefore, the President and Secretary of the Treasury did or did not rightly judge as to their powers under the act, the plaintiffs evidently agreed with them and voluntarily applied for permission to engage in the trade on the conditions imposed, and voluntarily paid the bonus which is now sought to be recovered back. The case does not come within any class of cases on which the plaintiffs rely to take it out of the rule as to voluntary payments. In our judgment, therefore, the defence in this case might have rested on this ground alone.

But we are also of opinion that the conditions imposed were authorized by the act of July 13th, 1861. Its language has been already quoted. The material part in reference to the question under discussion is the proviso of section three, which is as follows: "The President may, in his discretion, license and permit commercial intercourse * * * in such articles, and for such time, and by such persons as he in his discretion may think most conducive to the public interest; and such intercourse * * * shall be conducted and carried on

only in pursuance of rules and regulations prescribed by the Secretary of the Treasury."

It is contended that the imposition of the bonus of four cents per pound was not a "rule" or a "regulation" within the fair meaning of the act; and it is conceded that in many cases the power to make rules and regulations on a particular subject is a limited power, having respect to mode and form, and time and circumstance, and not to substance. But it must also be conceded that in other cases the power is much more extensive and substantial. Thus, in the Constitution, the several powers "to regulate commerce," "to establish a uniform rule of naturalization," "to make all needful rules and regulations respecting the territory or other property belonging to the United States," are understood to give plenary control over those subjects. The power to regulate commerce has been held to include the power to suspend it, (1 Kent, 432,) and the power to make rules and regulations respecting the territory of the United States, has been held to include the power to legislate for and govern such territory, and establish governments therein, (4 Wheaton, 422; Story on the Constitution, § 1328.) The extensive effect given to these clauses is undoubtedly largely due to the character of the instrument and that of the donee of the powers, to wit, the legislature of the United States to whom the grant of a power means the grant of a branch of sovereignty. It shows, however, that the rule of construction depends, at least in some sort, upon the nature of the subject-matter. In the case before us, the power of the government to open and regulate trade with the enemy was intended to be conferred upon the President and the Secretary of the Treasury. The power of regulation in such a case is to be taken in its broadest sense, and, in our judgment, included the power to impose such conditions as the President and Secretary should see fit.

The statutes relating to the internal revenue, passed July 1st, 1862, and March 7th, 1864, which have been referred to for the purpose of showing that Congress imposed a special tax upon cotton, and, therefore, could not have intended by the act of 1861 to sanction the regulations of the treasury now in question, do not, in our judgment, have that effect. The act of 1862 imposed a tax of half a cent per pound on all cotton, to be paid before its removal from the place of production. The same act and section imposed various taxes on a hundred other articles. The question is, did Congress intend, by the imposition of these taxes, to revoke by implication, any power given to the Executive Department of imposing such regulations as it might see fit for the carrying on of trade with insurrectionary districts? We answer, certainly not. The two subjects were entirely distinct. No conflict or repugnancy could arise in relation thereto. When, in March, 1863, the President issued his license to trade in cotton and other articles in the insurrectionary districts, under and subject to the conditions contained in the regulations adopted by the Secretary of the Treasury, his action was not inconsistent with or repugnant to the internal revenue law passed the year before. It had nothing to do with that law or the subject-matter of it. The conditions exacted by him were not imposed in the exercise of the taxing power, but of the war power of the government. The exaction itself was not properly a tax, but a bonus

required as a condition precedent for engaging in the trade. Whether, when the condition was fulfilled, the cotton became subject to the internal revenue law is a question we are not called upon to decide. There was no inconsistency between the regulations and the law any more than there is between a license tax for carrying on a particular trade and the excise imposed on the products of that trade. The act of March 7th, 1864, raised the internal revenue tax on cotton to two cents a pound where no duty had already been levied, paid, or collected thereon. Neither does this act present any inconsistency with the regulations in question. If it refers to them at all (when speaking of duties already paid) it contains an implied recognition of them. If it does not refer to them, it does not contravene them.

The position that Nashville, being within the National lines, was not hostile territory in 1863 and 1864, and, therefore, not within the prohibition of commercial intercourse contained in the act of 1861, is not tenable. The State of Tennessee was named in the President's proclamation as one of the States in insurrection; and, as we have seen, the exceptions made in his first proclamation in favor of maintaining commercial intercourse with parts of such States remaining loyal, or occupied by the forces of the United States, were abrogated by the proclamation of April 2d, 1863, except as to West Virginia and certain specified ports. There was nothing in this action of the President repugnant to, or not in conformity with, the act of 1861. "This revocation," as remarked by this court in the case of *The Venice*, 2 Wall. 278, 47 L. Ed. 866, "merely brought all parts of the insurgent States under the special licensing power of the President, conferred by the act of July 13th, 1861." The act gave the President power, where a State or part of a State remained irreclaimable, to declare that the inhabitants of such State, or any section or part thereof where such insurrection existed, were in a state of insurrection. This power clearly gave the President a discretion to declare an entire State, where the insurrection was persisted in, or only a hostile district therein, in a state of insurrection. Finding the attempt to discriminate between the different parts of a State (except in peculiar cases) impracticable, he abandoned the attempt, and declared the entire State in a state of insurrection. He clearly had authority so to do, more especially as the insurrection was supported by State organizations and the actual State authorities. Thenceforth the war became a well-defined territorial war, and was in great measure conducted as such. The further provision of the act, that all commercial intercourse with the insurrectionary districts should cease "so long as such condition of hostility shall continue," could not be construed as allowing such intercourse to be resumed by individuals at will, as fast and as far as our armies succeeded in occupying insurgent territory. The "condition of hostility" remained impressed upon the insurrectionary districts until it was authoritatively removed by the proclamation of the President at the close of the war.

This view of the meaning of the act of 1861 is corroborated by the Act of March 12th, 1863, respecting abandoned and captured property.

On the 1st of July, 1862, the President had issued a proclamation declaring what States and parts of States were in insurrection, with

a view to the provisions of the act imposing a land tax, and made no exception of any fractions of States, except the counties constituting West Virginia. Expressly referring to this proclamation, Congress, in the fourth section of the act referred to, enacted "that all property coming into any of the United States not declared in insurrection as aforesaid, from any of the States declared in insurrection, through or by any other person than any agent duly appointed under the provisions of this act, or under a lawful clearance by the proper officer of the Treasury Department, shall be confiscated." Act of March 12th, 1863, 12 Stat. at Large, 820, § 4. This is a clear recognition on the part of Congress of the President's demarcation of insurrectionary territory. It is also a recognition of the treasury regulations as to intercourse with that territory—not, perhaps, of any specific regulations, but of the applicability of such regulations to all portions of insurrectionary territory, whether under occupation of the Union forces or not.

But it is unnecessary to pursue this subject. We have frequently held that the civil war affected the status of the entire territory of the States declared to be in insurrection, except as modified by declaratory acts of Congress or proclamations of the President; and nothing but the apparent earnestness with which the point has been urged would have led to a further discussion of the point. See *Mrs. Alexander's Cotton*, 2 Wall. 404, 17 L. Ed. 915; *Coppell v. Hall*, 7 Wall. 542, 19 L. Ed. 244; *McKee v. United States*, 8 Wall. 163, 19 L. Ed. 329; and numerous other cases.

We are also of opinion that the act of July 2d, 1864 (13 Stat. at Large, 375) recognized and confirmed the regulations in question. It is sufficient to quote a portion of the third section to evince the correctness of this conclusion. It enacts as follows: "That all moneys arising from the leasing of abandoned lands, houses, and tenements, or from sales of captured and abandoned property collected and sold in pursuance of said act, or of this act, or from fees collected under the rules and regulations made by the Secretary of the Treasury, and approved by the President, dated respectively the 28th of August, 1862, 31st of March, and 11th of September, 1863, or under any amendments or modifications thereof, which have been or shall be made by the Secretary of the Treasury and approved by the President, for conducting the commercial intercourse, which has been or shall be licensed and permitted by the President, with and in States declared in insurrection, shall, after satisfying therefrom all necessary expenses, to be approved by the Secretary of the Treasury, be paid into the treasury of the United States; and all accounts of moneys received or expended in connection therewith shall be audited by the proper accounting officers of the treasury."

Here the regulations in question are referred to by name and date, and the money accruing under their operation (the great bulk of which was derived from the bonus on cotton) was directed to be paid into the treasury. It is designated by the term "fees," it is true, but that was the designation used in the regulations themselves. It will be observed that the law was prospective, relating to moneys thereafter to be received, as well as to those already received. This was clearly

an implied recognition and ratification of the regulations, so far as any ratification on the part of Congress may have been necessary to their validity.

It is hardly necessary, under the view we have taken of the character of the regulations in question, and of the charge or bonus objected to by the plaintiffs, to discuss the question of the constitutionality of the act of July 13th, 1861, regarded as authorizing such regulations. As before stated, the power of the government to impose such conditions upon commercial intercourse with an enemy in time of war as it sees fit, is undoubted. It is a power which every other government in the world claims and exercises, and which belongs to the government of the United States as incident to the power to declare war and to carry it on to a successful termination. We regard the regulations in question as nothing more than the exercise of this power. It does not belong to the same category as the power to levy and collect taxes, duties, and excises. It belongs to the war powers of the government, just as much so as the power to levy military contributions, or to perform any other belligerent act.

We perceive no error in the record, and the judgment of the Circuit Court must be
Affirmed.

7. TOTTEN v. UNITED STATES.

(Supreme Court of the United States, 1875. 92 U. S. 105, 23 L. Ed. 605.)

Appeal from the Court of Claims.

Mr. Justice FIELD delivered the opinion of the court.

This case comes before us on appeal from the Court of Claims. The action was brought to recover compensation for services alleged to have been rendered by the claimant's intestate, William A. Lloyd, under a contract with President Lincoln, made in July, 1861, by which he was to proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States, and report the facts to the President; for which services he was to be paid \$200 a month.

The Court of Claims finds that Lloyd proceeded, under the contract, within the rebel lines, and remained there during the entire period of the war, collecting, and from time to time transmitting, information to the President; and that, upon the close of the war, he was only reimbursed his expenses. But the court, being equally divided in opinion as to the authority of the President to bind the United States by the contract in question, decided, for the purposes of an appeal, against the claim, and dismissed the petition.

We have no difficulty as to the authority of the President in the matter. He was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy; and contracts to compensate such agents are so far binding upon the government as to render it

lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control. Our objection is not to the contract, but to the action upon it in the Court of Claims. The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service, with liability to publicity in this way, would be impossible; and, as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery.

It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.

Judgment affirmed.

8. UNITED STATES v. SYMONDS.

(Supreme Court of the United States, 1887. 120 U. S. 46, 7 Sup. Ct. 411, 30 L. Ed. 557.)

Appeal from the Court of Claims.

HARLAN, J. The question in this case is whether certain services of the appellee, a lieutenant in the navy of more than five years' standing, were performed "at sea," within the meaning of section 1556 of the

Revised Statutes. That section provides as follows: "The commissioned officers and warrant officers on the active list of the navy of the United States, and the petty officers, seamen, ordinary seamen, firemen, coal-heavers, and employes in the navy, shall be entitled to receive annual pay at the rates herein stated, after their respective designations:

* * * Lieutenants, during the first five years after date of commission, when at sea, \$2,400; on shore duty, \$2,000; on leave or waiting orders, \$1,600; after five years from such date, when at sea, \$2,600; on shore duty, \$2,200; on leave or waiting orders, \$1,800."

By an order of the secretary of the navy, June 30, 1881, the officer commanding the United States training ship *New Hampshire*, then at Norfolk, Virginia, was authorized to enlist officers' stewards, cooks, and servants, such as were allowed for a vessel with her complement of officers; the order declaring that her officers "will be considered as attached to a vessel commissioned for sea service, the same as other apprentice training vessels." On the first day of April, 1882, Symonds, in obedience to orders, assumed the post of executive officer of the *New Hampshire*, and thereafter discharged the duties of that position, which were similar to those performed by executive officers of cruising ships. He also discharged other duties of a character more exacting and arduous than those on board of any other class of naval vessels. There was no change in the nature of his services after he reported for duty as executive officer of the *New Hampshire*. He was required to have his quarters on board, to wear his uniform, to mess on the vessel, and was not permitted, by the rules of the service, to live with his family. When he reported on board that ship she was stationed at Narragansett bay, and, during most of his service thereon, was the flag-ship of the training squadron.

On the seventh day of July, 1882, the then secretary of the navy issued an order to the effect that, "on and after the first day of August next, the *New Hampshire*, the *Minnesota*, the *Intrepid*, and the *Alarm* will not be considered in commission for sea service." There was, however, no change in the status of the ship on or after August, 1882, her equipment and complement of officers being those of a cruising ship. From April 1, 1882, to July 31, 1882, appellee was allowed sea pay, and commutation of rations at 30 cents per day; but from the latter date he was allowed only shore pay of an officer of his grade, without rations or commutation therefor. This suit was brought by appellee to recover the difference between pay for sea and shore duty, as regulated by section 1556 of the Revised Statutes.

Section 1571 of the Revised Statutes—which is a reproduction of the third section of an act of June 1, 1860, increasing and regulating the pay of the navy, (12 St. 27; Comp. St. 1916, § 2859)—provides that "no service shall be regarded as sea service except such as shall be performed at sea, under orders of a department, and in vessels employed by authority of law." It is not disputed that the services of Symonds were performed under the orders of the secretary of the navy, and in a vessel employed by authority of law. If they were performed "at sea," his compensation therefor is absolutely fixed by section 1556. Does the statute confer upon the secretary of the navy, acting alone or by direction of the president, the power to declare a particular serv-

ice to be shore service, if, in fact, it was performed by the officer "when at sea," under the orders of the department, and on a vessel employed by authority of law? By the navy regulations of 1876, it was declared that "duty on board a sea-going vessel of the navy in commission, on board a practice ship at sea, or on board a coast-survey vessel actually employed at sea, will be regarded by the department as sea service." Page 85. Assuming that the first clause of that regulation contemplates services at sea under the orders of the department, in a vessel employed with authority of law, it is clear that all the different kinds of services described therein are services performed at sea, in the meaning of section 1556. But they are to be deemed such, not because the secretary of the navy has announced that the department will so regard them, but because they are, in fact, services performed at sea, and not on shore. If the regulations of 1876 had not recognized services "on board a practice ship at sea" as sea services, the argument in behalf of the government would imply that they could not be regarded by the courts, or by the proper accounting officers, as sea services; in other words, that the secretary of the navy could fix, by order, and conclusively, what was and what was not sea service. But congress certainly did not intend to confer authority upon the secretary of the navy to diminish an officer's compensation, as established by law, by declaring that to be shore service which was, in fact, sea service, or to increase his compensation by declaring that to be sea service which was, in fact, shore service. The authority of the secretary to issue orders, regulations, and instructions, with the approval of the president, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by congress in reference to the navy. He may, with the approval of the president, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers, or conferring rights upon others. The contrary has never been held by this court.

What we now say is entirely consistent with *Gratiot v. U. S.*, 4 How. 80, 11 L. Ed. 884, and *Ex parte Reed*, 100 U. S. 13, 25 L. Ed. 538, upon which the government relies. Referring, in the first case, to certain army regulations, and in the other to certain navy regulations, which had been approved by congress, the court observed that they had the force of law. See, also, *Smith v. Whitney*, 116 U. S. 181, 6 Sup. Ct. 570, 29 L. Ed. 601. In neither case, however, was it held that such regulations, when in conflict with the acts of congress, could be upheld. If the services of Symonds were, in the meaning of the statute, performed "at sea," his right to the compensation established by law for sea service is as absolute as is the right of any other officer to his salary as established by law. The same observations may be made in reference to the order of the secretary of the navy of July 7, 1882, which—without modifying the previous order that Symonds should perform the duties of executive officer of the New Hampshire—declared that that ship would not be considered as in commission for sea service after August 1, 1882. It does not appear that the secretary had any purpose, by his order, to affect the pay of the officers of the ship as fixed by the statute. Other reasons doubtless suggested the propriety

or necessity of its being issued. But his order is relied upon here as depriving Symonds of the right to sea pay after the date last named. For the reasons stated, that order could not convert the services of Symonds from sea services into shore services, if they were, in fact, performed when "at sea."

We concur in the conclusion reached by the court of claims, namely, that the sea pay given in section 1556 may be earned by services performed under the orders of the navy department in a vessel employed, with authority of law, in active service in bays, inlets, roadsteads, or other arms of the sea, under the general restrictions, regulations, and requirements that are incident or peculiar to service on the high sea. It is of no consequence, in this case, that the *New Hampshire* was not, during the period in question, in such condition that she could be safely taken out to sea beyond the main-land. She was a training ship, anchored in Narragansett bay during the whole time covered by the claim of appellee, and was subject to such regulations as would have been enforced had she been put in order and used for purposes of cruising, or as a practice ship at sea. Within the meaning of the law, Symonds, when performing his duties as executive officer of the *New Hampshire*, was "at sea."

Judgment affirmed.

9. RUNKLE v. UNITED STATES.

(Supreme Court of the United States, 1887. 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. Ed. 1167.)

Appeals from the court of claims.

WAITE, C. J. This record shows that on the fourteenth of September, 1882, Benjamin P. Runkle filed in the office of the second auditor of the treasury department a claim based on the decision of this court in *U. S. v. Tyler*, 105 U. S. 244, 26 L. Ed. 985, for longevity pay as an officer in the army of the United States, "retired from active service;" and that on the twenty-seventh of June, 1883, the secretary of the treasury referred it to the court of claims, under section 2 of the act of March 3, 1883 (chapter 116, 22 St. 485, Comp. St. 1916, § 1139), for an opinion upon the following questions: "(1) Was the court-martial that tried Benjamin P. Runkle duly and regularly organized, and had it jurisdiction of the person of said Runkle, and of the charges upon which he was tried? (2) Were the proceedings and findings of said court-martial regular, and the sentence duly approved in part by the president of the United States, as required by law? (3) Was Benjamin P. Runkle legally cashiered and dismissed from the army of the United States in pursuance of said court-martial and subsequent proceedings? (4) Was the president of the United States authorized and empowered by executive order to restore said Runkle to the army, as it is claimed he was restored by the order of August 4, 1877? (5) Is Benjamin P. Runkle now a retired army officer, with the rank of major, and, as such officer, entitled to longevity pay under what is known as the *Tyler* decision?" Runkle thereupon filed his petition in the court of claims,

in accordance with the rules of practice in that court applicable to such cases, and the United States put in a counter-claim for "\$23,-585.62, moneys paid to the said claimant by the paymaster general and his subordinates without authority of law; being the pay and allowances of a major in the army upon the retired list from the fourth day of August, 1877, to January 1, 1884, during which period the said claimant was not a major in the army, nor in any way authorized to draw pay and allowances as aforesaid."

The facts as found by the court of claims are as follows:

(1) April 22, 1861, the claimant was mustered in as a captain of Thirteenth Ohio volunteer infantry, and served as such till November 8, 1861, when he was mustered in as major. August 18, 1862, he was honorably mustered out. August 19, 1862, he was mustered in as colonel of Forty-fifth Ohio volunteer infantry, and honorably mustered out July 21, 1864. August 29, 1864, he accepted appointment as lieutenant colonel of Veteran Reserve Corps, and was honorably mustered out October 5, 1866. October 6, 1866, he accepted appointment as major of Forty-fifth United States infantry, became unassigned, March 15, 1869, and was placed on the retired list as major United States army, December 15, 1870.

(2) At the time he was so placed on the retired list he was on duty as a disbursing officer of the bureau of refugees, freedmen, and abandoned lands for the state of Kentucky, and had been on that duty from April 11, 1867; and continued on it, without any new assignment to it, until he was arrested for trial before a court-martial, as hereinafter shown.

(3) June 25, 1872, the following special order, No. 146, was issued by the war department: "(1) By direction of the president, a general court-martial is hereby appointed to meet at Louisville, Kentucky, on the fifth day of July, 1872, or as soon thereafter as practicable, for the trial of Second Lieutenant John L. Graham, Thirteenth infantry, and such other prisoners as may be brought before it." Before the court-martial convened and organized under this order, the said Runkle was arraigned and tried on the following charges: "Charge 1. Violation of the act of congress approved March 2, 1863, c. 67, § 1. Charge 2. Conduct unbecoming an officer and a gentleman." The specifications presented under these charges were all based on acts alleged to have been done by the claimant while on duty as a disbursing officer of the bureau of refugees, freedmen, and abandoned lands. There were 13 specifications under the first charge, and 14 under the second. All the specifications averred acts done by him in the year 1871, except the first and fifth under charge 1, and the first, fifth, and fourteenth, under charge 2, all of which averred acts done in 1870, before he was placed on the retired list. Of the first and fifth specifications under charge 1, and of the fourteenth under charge 2, he was found guilty. He was also found guilty of 10 other specifications under charge 1, and of 5 other specifications under charge 2, all of which averred acts done by him in 1871. He was also found guilty of both charges; and was sentenced by the court to be cashiered, to pay the United States a fine of \$7,500, and

to be confined in such penitentiary as the president of the United States might direct for the period of four years, and, in the event of the nonpayment of the fine at the expiration of four years, that he should be kept in confinement in the penitentiary until the fine be paid, the total term of imprisonment, however, not to exceed eight years.

(4) The proceedings, findings, and sentence of said court-martial were transmitted to the secretary of war, who wrote upon the record the following order:

"The proceedings in the foregoing case of Major Benjamin P. Runkle, retired, United States Army, are approved, with the exception of the action of the court in rejecting as evidence a certain letter written by a witness for the prosecution, and offered to impeach his credibility; also in unduly restricting the cross-examination of the same witness in relation to the motives influencing his testimony. Inasmuch, however, as in the review of the case it was determined that the whole testimony of this witness could be excluded from consideration without impairing the force of the testimony for the prosecution, upon which the findings rest, the erroneous action of the court in this respect does not affect the validity of the sentence. The findings and sentence are approved. In view of the unanimous recommendation by the members of the court that accused shall receive executive clemency on account of his gallant services during the war, and of his former good character, and in consideration of evidence, by affidavits presented to the war department since his trial, showing that accused is now, and was at the time when his offense was committed, suffering under great infirmity in consequence of the wounds received in battle, and credible representations having been made that he would be utterly unable to pay the fine imposed, the president is pleased to remit all of the sentence except so much thereof as directs cashiering, which will be duly executed.

"Wm. W. Belknap, Secretary of War."

The said secretary also issued, January 16, 1873 a general order of the war department No. 7, series of 1873, announcing the sentence of the court-martial, and that "Major Benjamin P. Runkle, U. S. Army, (retired), ceases to be an officer of the army from the date of this order." From the date of this order till after August 4, 1877, the claimant's name was not borne upon the army register.

(5) August 4, 1877, R. B. Hayes, president of the United States, made the following order:

"Executive Mansion, Washington, August 4, 1877.

"In the Matter of the Application of Major Benjamin P. Runkle, U. S. Army, (retired.)

"The record of official action heretofore taken in the premises shows the following facts, to-wit: First. That on the fourteenth of October, 1872, Major Runkle was found guilty by court-martial upon the following charges, to-wit: 'Charge 1. Violation of the act of congress approved March 2, 1863, c. 67, § 1. Charge 2. Conduct unbecoming an officer and a gentleman.' Second. That on the sixteenth of January, 1873, W. W. Belknap, then secretary of war, approved

the proceedings of said court, and thereupon caused general order No. 7, series of 1873, to issue from the war department, by which it was announced that Major Benjamin P. Runkle was cashiered from the military service of the United States. Third. That subsequent to the date of said general order No. 7, to-wit, on the sixteenth day of January, 1873, Major Runkle presented to the president a petition, setting forth that the proceedings of said court had not been approved by the president of the United States, as required by law; that said conviction was unjust; that the record of said proceedings was not in form or substance sufficient in law to warrant the issuing of said order; and asking the revocation and annulment of the same. Fourth. That, in pursuance of this petition, the record of the official action theretofore had in the premises was, by direction of the president, Ulysses S. Grant, referred to the judge advocate general of the United States army for review and report. Fifth. That thereupon the judge advocate general reviewed the case, and made his report thereon, in which it is reported and determined, among other things, that, in the proceedings had upon the trial of the case by said court, 'it is nowhere affirmatively established that he (Major Runkle) actually appropriated any money to his own use.' It also appears in said report that the conviction of said Runkle, upon charge one as aforesaid, is sustained upon the opinion that sufficient proof of the crime of embezzlement on the part of the accused was disclosed by the evidence before the court. And with respect to charge two no reference to the same is made in said report, except to deny the sufficiency of the evidence in the case, for a conviction upon the fourteenth specification thereof; and it is to be observed that the thirteen remaining specifications under this charge are identical with the thirteen specifications under charge one. The judge advocate general further finds and determines in said report as follows, to-wit: 'For alleged failures to pay, or to pay in full,' on the part of the subagents, 'I am of the opinion that the accused cannot justly be held liable.' Sixth. That no subsequent proceedings have been had with reference to said report, and that the said petition of said Runkle now awaits further and final action thereon. Whereupon, having caused the said record, together with said report, to be laid before me, and having carefully considered the same, I am of opinion that the said conviction is not sustained by the evidence in the case, and the same, together with the sentence of the court thereon, are hereby disapproved; and it is directed that said order No. 7, so far as it relates to said Runkle, be revoked.

R. B. Hayes."

At the time of the issue by President Hayes of this order, the number of officers on the retired list of the army was 300, and continued so until November 19, 1877. During that period the claimant was carried on the army records as additional to the number of retired officers allowed by law, until a vacancy occurred on said last-named date; since which date he has been borne on the retired list, and up to January 1, 1884, has drawn pay to the amount of \$23,585.62. Of this sum \$9,195.27 was paid to him August 15, 1877, for the period from January 16, 1873, the date of the order signed by Secretary

Belknap, to the fourth of August, 1877, the date of the order of President Hayes.

(6) August 7, 1877, the claimant addressed a letter to the paymaster general of the army, asserting his legal right to pay as a retired major for the period of time between the dates of those two orders. This letter the paymaster general referred to the secretary of war with the following indorsement:

"Respectfully forwarded to the Hon. Secretary of War.

"It has been enjoined that questions of payment in such cases shall be submitted to the secretary of war. See letter of July 7, 1863, from Col. J. A. Hardee, asst. adjt. general, to the paymaster general, stating the orders of the war department that 'an officer restored to the service either by the revocation of the order of dismissal or discharge, or by simple restoration, is not entitled to pay for the period that he was out of service, unless the same is expressly ordered by the war department.' The language of the judge advocate general on this point is to the same effect. See Judge Advocate's Digest of 1868, p. 266. 'Where an order of the war department for the dismissal, discharge, or muster-out of an officer is subsequently revoked, and he reinstated in his former rank and position, it is competent for the president, in his discretion, to allow him pay for the interval during which he was illegally separated from the service under the original order.' The course of military administration has, however, developed no precise rule on this subject, each case of a claim for pay by such an officer having been, in practice, determined by the special circumstances surrounding it.

"Benj. Alvord, Paym'r General U. S. Army.

"P. M. G. Office, August 9, 1877."

The secretary of war returned the letter to the paymaster general, through the adjutant general, and when it reached the paymaster general it had on it the following indorsements:

"Respectfully returned (through the adjutant general) to the paymaster general. By the order of the president of August 4, 1877, the approval of the proceedings and sentence in the case of Major B. P. Runkle, of date January 16, 1873, was revoked, the said proceedings and sentence were disapproved, and the order of dismissal was set aside. This order of the president must be accepted by this department as revoking said order of dismissal from its inception, and as annulling all its consequences. As Major Runkle was, at the time of his trial and sentence, an officer of the retired list, the fact that he has not been on duty in the interim can make no difference, since a retired officer is not subject to duty. He will therefore be paid whenever funds are available for that purpose. This indorsement has been submitted to and is approved by the president.

"George W. McCrary, Secretary of War.

"War Dept., August 13, '77.

"Noted and respectfully forwarded.

"E. D. Townsend, Adjt. Gen'l.

"August 14, '77."

Upon receiving back the said letter, with said indorsements, the paymaster general made thereon this indorsement:

"Respectfully referred to Major Alexander Sharp, P. M., U. S. A. Present. Maj. Runkle was last paid to include January 15, 1873.

"Chas. T. Larned, Acting Paym'r Gen'l U. S. Army.

"C. T. L., P. M. G. O., August 15, 1877."

It was in obedience to the order of the president, signified by the above indorsement of the secretary of war, that the claimant was paid the aforesaid sum of \$9,195.27.

Upon the foregoing facts the conclusions of law were as follows: (1) That the claimant is not entitled to recover longevity pay; (2) that the defendants are not entitled, under their counter-claim, to recover the pay received by the claimant as a retired major, which accrued after the fourth of August, 1877, amounting to \$14,390.35; (3) that the defendants are entitled, under their counter-claim, to recover of the claimant \$9,195.27, being the amount paid him for the time between January 16, 1873, and August 4, 1877. 19 Ct. Cl. 395.

From a judgment entered in accordance with these conclusions both parties appealed.

We will first consider the second of the questions referred to the court of claims, namely: "Were the proceedings and findings of said court-martial regular, and the sentence duly approved by the president of the United States, as required by law?" The sixty-fifth article of war (2 St. 367, c. 20,) in force at the time of these proceedings, was as follows: "Any general officer commanding an army, or colonel commanding a separate department, may appoint general courts-martial whenever necessary. But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court-martial, in the time of peace, extending to the loss of life, or the dismissal of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution until after the whole proceedings shall have been transmitted to the secretary of war, to be laid before the president of the United States for his confirmation or disapproval and orders in the case. All other sentences may be confirmed and executed by the officer ordering the court to assemble, or the commanding officer, for the time being, as the case may be."

Thus it appears that the sentence of a general court-martial in time of peace, to the effect that a commissioned officer be cashiered,—dismissed from service,—is inoperative until approved by the president. Before then it is interlocutory and inchoate only. *Mills v. Martin*, 19 Johns. (N. Y.) 7, 30; *Sim. Cts. Mart.* (6th Ed.) c. 17, p. 294. A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose, and to perform a particular duty. When the object of its creation has been accomplished it is dissolved. 3 Greenl. Ev. § 470; *Brooks v. Adams*, 11 Pick. (Mass.) 442; *Mills v. Martin*, supra; *Duffield v. Smith*, 3 Serg. & R. (Pa.) 590, 599. Such, also, is the effect of the decision of this court in *Wise v. Withers*, 3 Cranch, 331, 2 L. Ed. 457, which, according to the interpretation given it by Chief Justice Marshall in *Ex parte Watkins*, 3 Pet.

193, 207, 7 L. Ed. 650, ranked a court-martial as "one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally." To give effect to its sentences, it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with; and that its sentence was conformable to law. *Dynes v. Hoover*, 20 How. 65, 80, 15 L. Ed. 838; *Mills v. Martin*, 19 Johns. (N. Y.) 33. There are no presumptions in its favor so far as these matters are concerned. As to them, the rule announced by Chief Justice Marshall in *Brown v. Keene*, 8 Pet. 112, 115, 8 L. Ed. 885, in respect to averments of jurisdiction in the courts of the United States applies. His language is: "The decisions of this court require that averment of jurisdiction shall be positive; that the declaration shall state expressly the facts on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments." All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction, and that their sentences were conformable to law, must be stated positively; and it is not enough that they may be inferred argumentatively.

As the sentence now under consideration involved the dismissal of Runkle from the army, it could not become operative until approved by the president, after the whole proceedings of the court-martial had been laid before him. The important question is therefore whether that approval has been positively shown.

The court of claims has found as a fact in the case that the "proceedings, findings, and sentence of said court-martial were transmitted to the secretary of war," but it has not found that they were laid before the president, or acted on by him, otherwise than may be inferred argumentatively from the orders of the secretary of war, and the subsequent action of President Grant and President Hayes. There can be no doubt that the president, in the exercise of his executive power under the constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. That has been many times decided by this court. *Wilcox v. Jackson*, 13 Pet. 498, 513, 10 L. Ed. 264; *U. S. v. Eliason*, 16 Pet. 291, 302, 10 L. Ed. 968; *Confiscation Cases*, 20 Wall. 92, 109, 22 L. Ed. 320; *U. S. v. Farden*, 99 U. S. 10, 19, 25 L. Ed. 267; *Wolsey v. Chapman*, 101 U. S. 755, 769, 25 L. Ed. 915.

Here, however, the action required of the president is judicial in its character, not administrative. As commander in chief of the army, he has been made by law the person whose duty it is to review the proceedings of courts-martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him, and decide personally whether they ought to be carried into effect. Such a power he can not delegate. His personal judgment is required, as much so as it would have been in passing on the case if he had been

one of the members of the court-martial itself. He may call others to his assistance in making his examinations, and in informing himself as to what ought to be done, but his judgment, when pronounced, must be his own judgment, and not that of another. And this because he is the person, and the only person, to whom has been committed the important judicial power of finally determining, upon an examination of the whole proceedings of a court-martial, whether an officer holding a commission in the army of the United States shall be dismissed from service as a punishment for an offense with which he has been charged, and for which he has been tried.

In this connection the following remarks of Atty. Gen. Bates, in an opinion furnished President Lincoln under date of March 12, 1864, (11 Op. Attys. Gen. 21,) are appropriate: "Undoubtedly the president, in passing upon the sentence of a court-martial, and giving to it the approval without which it cannot be executed, acts judicially. The whole proceeding, from its inception, is judicial. The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice,—rights which, in the very nature of things, can neither be exposed to danger, nor subjected to the uncontrolled will of any man, but which must be adjudged according to law. And the act of the officer who reviews the proceedings of the court, whether he be the commander of the fleet or the president, and without whose approval the sentence cannot be executed, is as much a part of this judgment, according to law, as is the trial or the sentence. When the president, then, performs this duty of approving the sentence of a court-martial dismissing an officer, his act has all the solemnity and significance of the judgment of a court of law."

We go, then, to the record to see whether it shows positively and distinctly that the sentence dismissing Runkle from the service was approved by President Grant. It does appear affirmatively that it was disapproved by President Hayes; and, if not approved by President Grant, Runkle was never legally out of the service. It is true that, if it had been approved, the subsequent disapproval would have been a nullity, and could not have the effect of restoring him to his place; but, if not approved, he was never out, and the disapproval kept him in, the same as if the court-martial had never been convened for his trial. In *Blake v. U. S.*, 103 U. S. 227, 26 L. Ed. 462, followed in *U. S. v. Tyler*, 105 U. S. 244, 26 L. Ed. 985, it was decided that the president had power to supersede or remove an officer of the army by the appointment, by and with the consent of the senate, of his successor; but here there was nothing of that kind. Runkle was never removed otherwise than by the sentence of the court-martial, and the order of the war department purporting to give it effect.

Coming, then, to the order on which reliance is had to show the approval of President Grant we find it capable of division into two separate parts,—one relating to the approval of the proceedings and sentence, and the other to the executive clemency which was invok-

ed and exercised. It is signed by the secretary of war alone, and the personal action of the president in the matter is nowhere mentioned, except in the remission of a part of the sentence. There is nothing which can have the effect of an affirmative statement that "the whole proceedings" had been laid before him for action, or that he personally approved the sentence. The facts found by the court of claims show that the proceedings, findings, and sentence of the court-martial "were transmitted to the secretary of war, and that he wrote the order thereon," but there they stop. What he wrote is in the usual form of departmental orders, and, so far as it relates to the approval of the sentence, indicates on its face departmental action only.

What follows in the order does not, to say the least, clearly show the contrary. It relates to the executive clemency which was exercised, and then, for the first and only time, it appears, in express terms, that the president acted personally in the matter. It is there said: "The president is pleased to remit all of the sentence, except so much thereof as directs cashiering." If all the rest of the order was the result of the personal action of the president, why was it referred to here, and not elsewhere? Might it not fairly be argued from this that the rest was deemed departmental business, and that part alone personal which required the exercise of the personal power of the president, under the constitution, of granting pardons? And besides, according to the order as it stands, this action of the president was had, not on "the whole proceedings," but "in view of the unanimous recommendation of the members of the court," "the former good character" of the accused, and "in consideration of evidence by affidavits presented to the war department since the trial," and "credible representations." If "the whole proceedings" had actually been laid before him, as required by the articles of war, it was easy to say so.

Then, again, at the end of the order, are these words, "which [the sentence] will be duly executed." That which immediately preceded related to the remission of a part of the sentence, and the secretary was careful to say that this was done by the president in person. The omission of any such language, or implication even, in the words which were added, leaves the order open to the construction that the secretary was acting all the time on the idea that the personal judgment of the president was required only in reference to that part of the proceeding which involved the exercise of the pardoning power, and that the rest belonged to the department.

Still further, it appears, from the order of President Hayes, that "the record of official action" showed that "on the sixteenth of January, 1873, W. W. Belknap, then secretary of war, approved the proceedings of said court," and thereupon issued the order from the war department announcing that Runkle was cashiered; and that after this order was issued, but on the same day, Runkle presented to President Grant a petition setting forth, among other things, "that the proceedings of said court had not been approved by the president of the United States as required by law." This petition was not only received by President Grant, but it was by him referred to

the judge advocate general for "review and report." Upon this reference the judge advocate general acted and reported on the whole case. President Grant did nothing further in the premises, and the matter remained open when President Hayes came into office. He then took it up as unfinished business, and, acting as though the proceedings had never been approved, entered an order of disapproval.

Under these circumstances, we cannot say it positively and distinctly appears that the proceedings of the court-martial have ever in fact been approved or confirmed, in whole or in part, by the president of the United States, as the articles of war required, before the sentence could be carried into execution. Consequently, Major Runkle was never legally cashiered or dismissed from the army, and he is entitled to his longevity pay, as well as that which he has already received for his regular pay, both before the order of Secretary Belknap was revoked and afterwards.

Such being our view of the case, it is unnecessary to consider any of the other questions which were referred to the court of claims. Neither do we decide what the precise form of an order of the president approving the proceedings and sentence of a court-martial should be, nor that his own signature must be affixed thereto. But we are clearly of opinion that it will not be sufficient unless it is authenticated in a way to show otherwise than argumentatively that it is the result of the judgment of the president himself, and that it is not a mere departmental order which might or might not have attracted his personal attention. The fact that the order was his own should not be left to inference only.

The judgment of the court of claims is reversed, and the cause remanded for further proceedings in conformity with this opinion.

2. MILITARY PERSONS—SPECIAL RIGHTS AND LIABILITIES IN CIVIL LAW

1. WILKES v. DINSMAN.

(Supreme Court of the United States, 1849. 7 How. 89, 12 L. Ed. 618.)

Error to the circuit court for the District of Columbia, in an action of trespass, brought by a person who served as a marine on board one of the vessels employed in the exploring expedition under the command of the defendant, alleging that the defendant caused him to be whipped and imprisoned. The nature of the justification, and the questions arising out of it, appear in the opinion of the court. * * *

WOODBURY, J., delivered the opinion of the court.

The original action in this case was trespass by a marine in the exploring expedition, against its commanding officer.

It will be seen, by the statement of the case, that the injury complained of was a punishment inflicted on the plaintiff by the defendant, in November, 1840, near the Sandwich Islands, for disobedience of orders, or a refusal to perform duty when directed.

The plaintiff claimed that the term for which he was bound to serve as a marine had then expired; that the defendant had no right or justification to detain him longer on board; and that his refusal to do duty longer being the only reason, and an insufficient one, for punishing him at all, under such circumstances he was entitled to recover damages of the defendant for subjecting him to receive twelve lashes, and for a repetition of the punishment on a subsequent day, after another request and refusal by him to obey. And also, in the mean time, for putting him in irons, and confining him in a native prison on the island of Oahu.

The defendant pleaded the general issue; * * *

Various questions of law arose during the trial, which are presented on the record in nine separate bills of exceptions by the defendant, and one by the plaintiff. Some of them are of an ordinary character, but others possess much interest, and are important in their consequences, not only to these parties, but to the government, and the community at large.

In a public enterprise like the exploring expedition, specially authorized by congress, in 1836, (see act of congress of 14th May, 1836, 5 Statutes at Large, 29, § 2,) for purposes of commerce and science, very valuable to the country, and not entirely without interest to most of the civilized world, it was essential to secure it from being defeated by any discharge of the crews before its great objects were accomplished, or by any want of proper authority, discretionary or otherwise, in the commander, to insure, if possible, a successful issue to the enterprise.

It is not to be lost sight of, however, and will be explained more fully hereafter, that, while the chief agent of the government, in so important a trust, when conducting with skill, fidelity, and energy, is to be protected under mere errors of judgment in the discharge of his duties, yet he is not to be shielded from responsibility, if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty, or any species of oppression, founded on considerations independent of public ends.

The humblest seaman or marine is to be sheltered under the ægis of the law from any real wrong, as well as the highest in office. Considerations connected with these views are involved in most of the points ruled by the court below. * * *

Having thus ascertained that the defendant had further jurisdiction over the plaintiff, and it being admitted that the latter refused to perform his orders, and, in the language of the 14th article, that he disobeyed the lawful orders of his superior officer, 2 Stats. at Large, 47, and this on an important subject, and under circumstances likely to extend to many more of the crew, and to end in mutiny or an abandonment of the expedition, if not suppressed with promptitude and decisive energy, the next inquiry is whether the punishment was inflicted within the license of the law.

It is not the province of the judiciary to decide on the expediency or humanity of the law, but merely its existence, and the conformity or non-conformity to it by the defendant.

Where a private in the navy, therefore, is guilty of any "scandalous

conduct," the commander is, by the 3d article of the laws for the government of the navy, authorized to inflict on him twelve lashes, without the formality of a court-martial. 2 Stats. at Large, 46.

If disobedience was not such conduct, but, under the 14th article, exposed the offender to severe punishment by a court-martial, the plaintiff could hardly complain that it was mitigated to only the twelve lashes which the captain was authorized to inflict without calling such a court, by article 30, as well as article 3, *ibid.* 49, and no more stripes were given here for any one act of disobedience than the 3d and 30th articles warrant.

Nor were they accompanied by any circumstance of unusual severity or of cruelty, either in the manner or the instrument employed. After an interval of two or three days, according to the counts in the writ, as well as the proposed proof, and after explanations and exhortations to duty, and time given for reflection, followed by renewed disobedience, the same number of stripes was repeated, because deemed necessary in order to enforce duty.

After another interval for like purposes, on a subsequent day, upon a new refusal, the punishment was again inflicted, and the plaintiff thereupon returned to duty.

If precedents were needed to justify this course, it has been settled in a penal prosecution that a like act, when prohibited, if distinctly repeated, even on the same day, constitutes a second offence, and incurs an additional penalty. *Brooks qui tam v. Milliken*, 3 D. & E. 509.

Again, if this disobedience could not be considered a technical offence under either of the articles already referred to, it surely is an offence in nautical service, and one of much magnitude at times; and the 32d article provides that all crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea. 2 Stats. at Large, 49.

In the discipline of the merchant service, where an act of disobedience is persisted in, and endangers the due subordination of others, the captain is justified, not only in punishing personally, but in resorting to any reasonable measures necessary to produce submission and safety. See *Fuller v. Colby*, 3 Woodb. & Min. 1, Fed. Cas. No. 5,149, and cases there cited, and 9 Law Reporter, 386.

Under this portion of the inquiry arises also the question as to the ruling about putting the plaintiff in irons, and about the confinement of him on shore in a prison of the natives.

This appears to have been done under the same aspect of the case, looking to the preservation of sound discipline and the safe imprisonment of the plaintiff till he consented to return to his duties.

It appears that several other marines in the squadron were taking like insubordinate ground with the plaintiff, and that the escape of two prisoners confined on board had already been allowed; that many more appeared anxious to quit the vessels, doubtless under the seductive attractions of the islands near; that several of the officers and men were engaged at a distance in making scientific observations; and that, under such circumstances, a confinement of the plaintiff on shore

for a few days might be a prudent precaution to prevent a defeat of the chief objects of the expedition.

This, therefore, without proof of malice, is not actionable, nor does it amount to putting a seaman on shore in a foreign country to desert him there, contrary to the act of congress, as that must be done maliciously, and then is properly punishable by statute, no less than on principles of admiralty law. 4 Statutes at Large, 117, § 10; Abbott on Shipping, 177; Jay v. Almy, 1 Woodb. & Min. 268, Fed. Cas. No. 7,236; United States v. Netcher, 1 Story, 307, Fed. Cas. No. 15,866. But if it was only to imprison him there for a few days, and, under all the circumstances, was considered by the defendant to be with more propriety and safety than in the squadron, it was justifiable, unless accompanied by malice. *The William Harris*, Ware, 367, 17 Fed. Cas. No. 17,695; *The Nimrod*, Ware, 9, Fed. Cas. No. 10,267; *Wilson v. The Mary*, Gilpin, 31, Fed. Cas. No. 17,823; 3 Kent Com. 182.

As to the cleanliness of the prison the healthfulness of the food, and the general treatment while there, the evidence is contradictory, and is not now a matter for our decision.

The only remaining consideration, in order to dispose of all which is left in any of the exceptions, is the competency of the commander to decide on these various questions without being amenable to the plaintiff in an action at law for any mere error of judgment in the exercise of his discretion, which may have been involuntarily committed under the exigencies of the moment.

In order to settle this point correctly, it being in itself a very important one, as well as running through several of the exceptions, it will be necessary to advert to the circumstances, that Captain Wilkes was not acting here in a private capacity and for private purposes; but, on the contrary, the responsible duties he was performing were imposed on him by the government as a public officer. In the next place, those duties were not voluntarily sought or assumed, but met and discharged in the routine of his honorable and gallant profession, and under high responsibilities for any omission or neglect on his part, instead of being a volunteer, as in most of the cases of collectors and sheriffs made liable. 2 Strange, 820; 6 D. & E. 443. Now, in respect to those compulsory duties, whether in reenlisting or detaining on board, or punishing or imprisoning on shore, while arduously endeavoring to perform them in such a manner as might advance the science and commerce and glory of his country, rather than his own personal designs, a public officer, invested with certain discretionary powers, never has been, and never should be, made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty. See the cases hereafter cited.

Nor can a mandamus issue to such an officer, if he is intrusted with discretion over the subject-matter. *Decatur v. Paulding*, 14 Pet. 497, 599, Appx. 10 L. Ed. 559, 609; *Brashear v. Mason*, 6 How. 102, 12 L. Ed. 357.

His position, in such case, in many respects, becomes quasi judicial, and is not ministerial, as in several other cases of liability by mere ministerial officers. *Jenkins v. Waldron*, 11 Johns. 114, 6 Am. Dec. 359; *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181; *Decatur v.*

Paulding, 14 Pet. 516, 599, Appx. 10 L. Ed. 559, 609. And it is well settled that "all judicial officers, when acting on subjects within their jurisdiction, are exempted from civil prosecution for their acts." *Evans v. Foster*, 1 N. H. 377; 14 Pet. 600, App.

Especially is it proper, not only that a public officer, situated like the defendant, be invested with a wide discretion, but be upheld in it, when honestly exercising, and not transcending it, as to discipline in such remote places, on such a long and dangerous cruise, among such savage islands and oceans, and with the safety of so many lives, and the respectability and honor of his country's flag in charge.

In such a critical position, his reasons for action, one way or another, are often the fruits of his own observation, and not susceptible of technical proof on his part. No review of his decisions, if within his jurisdiction, is conferred by law on either courts, or juries, or subordinates, and, as this court held in another case, it sometimes happens that "a prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object." "While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the fact upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance." *Martin v. Mott*, 12 Wheat. 30, 6 L. Ed. 537.

Hence, while an officer acts within the limits of that discretion, the same law which gives it to him will protect him in the exercise of it. But for acts beyond his jurisdiction, or attended by circumstances of excessive severity, arising from ill will, a depraved disposition, or vindictive feeling, he can claim no exemption, and should be allowed none under color of his office, however elevated, or however humble the victim. 2 Carr. & Payne, 158, note; 4 Taunton, 67.

When not offending under such circumstances, his justification does not rest on the general ground of vindicating a trespass in private life, and between those not acting officially and not with a discretion. Because then, acts of violence being first proved, the person using them must go forward next, and show the moderation or justification of the blows used. 2 Greenleaf on Ev. § 99.

The chief mistake below was in looking only to such cases as a guide. For the justification rests here on a rule of law entirely different, though well settled, and is, that the acts of a public officer on public matters, within his jurisdiction, and where he has a discretion, are to be presumed legal, till shown by others to be unjustifiable. *Gidley v. Palmerston*, 7 J. B. Moore, 111; *Vanderheyden v. Young*, 11 Johns. (N. Y.) 150; 6 Har. & Johns. 329; *Martin v. Mott*, 12 Wheat. 31, 6 L. Ed. 537.

This, too, is not on the principle merely that innocence and doing right are to be presumed, till the contrary is shown. 1 Greenl. §§ 35-37. But that the officer, being intrusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved against him, either that he exercised the power confided in cases without his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or wilful oppression, or, in the words of Lord Mansfield, in *Wall v. McNamara*, that he exercised it as "if the heart

is wrong." 2 Carr. & Payne, 158, note. In short, it is not enough to show he committed an error in judgment; but it must have been a malicious and wilful error. *Harman v. Tappenden et al.*, 1 East, 562, 565, note.

It may not be without some benefit, in a case of so much interest as this, to refer a moment further to one or two particular precedents in England and this country and even in this court, in illustration of the soundness of these positions.

Thus in *Drewe v. Coulton*, 1 East, 563, note, which was an action against the defendant, who was a public returning officer, for refusing a vote, Wilson, J. says: "This is, in the nature of it, an action for misbehavior by a public officer in his duty. Now, I think that it cannot be called misbehavior unless maliciously and wilfully done, and that the action will not lie for a mistake in law." "By wilful, I understand contrary to a man's own conviction."

"In very few instances is an officer answerable for what he does to the best of his judgment in cases where he is compellable to act, but the action lies where the officer has an option whether he will act or no." See these last cases collected in *Seaman v. Patten*, 2 Caines (N. Y.) 313, 315.

In a case in this country, *Jenkins v. Waldron*, 11 Johns. (N. Y.) 121, 6 Am. Dec. 359, Spencer, J., says, for the whole court, on a state of facts much like the case in East: "It would, in our opinion, be opposed to all the principles of law, justice, and sound policy, to hold that officers called upon to exercise their deliberate judgments are answerable for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice." Similar views were again expressed by the same court in the same volume (11 Johns. [N. Y.] p. 160,) in *Vanderheyden v. Young*. And in a like case, the supreme court of New Hampshire recognized a like principle. "It is true," said the chief justice for the court, "that moderators may decide wrongly with the best intentions, and then the party will be without remedy. And so may a court and jury decide wrongly, and then the party will also be without remedy." But there is no liability in such case without malice alleged and proved. *Wheeler v. Patterson*, 1 N. H. 90, 8 Am. Dec. 41.

Finally, in this court, like views were expressed, through Justice Story, in *Martin v. Mott*, 12 Wheat. 31, 6 L. Ed. 537: "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statutes constitute him the sole and exclusive judge of the existence of these facts." "Every public officer is presumed to act in obedience to his duty, until the contrary is shown."

Under these established principles and precedents, it will be seen that the rulings below must be held erroneous whenever the court departed from them, and required the defendant, as on several occasions, to go forward, and in the first instance to prove details rebutting any error or excess.

As, for illustration, to prove in the outset facts showing a necessity to detain the plaintiff, before the latter had offered any evidence it was done from malice or without cause; or to prove that the prison

on shore was safer and more suitable for the plaintiff's confinement than the vessels, under the peculiar circumstances then existing, until the plaintiff had first shown that no discretion existed in the defendant to place him there, or that he did it *malâ fide*, or for purposes of cruelty and oppression; or to prove that the punishment inflicted was not immoderate, and not unreasonable, when it is admitted to have been within the limits of his discretion, as confided to him by the articles for the government of the navy. On the contrary, as has been shown, all his acts within the limits of the discretion given to him are to be regarded as *primâ facie* right till the opposite party disprove this presumption.

The judgment below must therefore be reversed, and a *venire de novo* awarded, and the new trial be governed by the principles here decided.

2. MITCHELL v. HARMONY.

(Supreme Court of the United States, 1851. 13 How. 115, 14 L. Ed. 75.)

This case was brought up, by a writ of error, from the Circuit Court of the United States for the Southern District of New York. * * *

Mr. Chief Justice TANEY delivered the opinion of the court.

This is an action of trespass brought by the defendant in error, against the plaintiff in error, to recover the value of certain property taken by him, in the province of Chihuahua during the late war with Mexico.

It appears that the plaintiff, who is a merchant of New York, and who was born in Spain, but is a naturalized citizen of the United States, had planned a trading expedition to Santa Fé, New Mexico, and Chihuahua, in the Republic of Mexico, before hostilities commenced; and had set out from Fort Independence, in Missouri, before he had any knowledge of the declaration of war. As soon as the war commenced, an expedition was prepared under the command of General Kearney, to invade New Mexico; and a detachment of troops was set forward to stop the plaintiff and other traders until General Kearney came up, and to prevent them from proceeding in advance of the army.

The trading expedition in which the plaintiff and the other traders were engaged, was, at the time they set out, authorized by the laws of the United States. And when General Kearney arrived they were permitted to follow in the rear and to trade freely in all such places as might be subdued and occupied by the American arms. The plaintiff and other traders availed themselves of this permission and followed the army to Santa Fé.

Subsequently General Kearney proceeded to California, and the command in New Mexico devolved on Colonel Doniphan, who was joined by Colonel Mitchell, who served under him, and against whom this action was brought.

It is unnecessary to follow the movements of the troops or the traders particularly, because, up to the period at which the trespass is

alleged to have been committed at San Elisario, in the province of Chihuahua, it is conceded that no control was exercised over the property of the plaintiff, that was not perfectly justifiable in a state of war, and no act done by him that had subjected it to seizure or confiscation by the military authorities.

When Colonel Doniphan commenced his march for Chihuahua, the plaintiff and the other traders continued to follow in the rear and trade with the inhabitants, as opportunity offered. But after they had entered that province and were about to proceed in an expedition against the city of that name, distant about 300 miles, the plaintiff determined to proceed no further, and to leave the army. And when this determination was made known to the commander at San Elisario he gave orders to Colonel Mitchell, the defendant, to compel him to remain with and accompany the troops. Colonel Mitchell executed the order, and the plaintiff was forced, against his will, to accompany the American forces with his wagons, mules and goods, in that hazardous expedition.

Shortly before the battle of Sacramento, which was fought on the march to the town of Chihuahua, Colonel Doniphan, at the request of the plaintiff, gave him permission to leave the army and go to the hacienda of a Mexican by the name of Parns, about eight miles distant, with his property. But the plaintiff did not avail himself of this permission; and apprehended, upon more reflection, that his property would be in more danger there than with the army; and that a voluntary acceptance on his part, and resuming the possession at his own risk, would deprive him of any remedy for its loss if it should be taken by the Mexican authorities. He remained therefore with the troops until they entered the town. His wagons and mules were used in the public service in the battle of Sacramento, and on the march afterwards. And while the town remained in possession of the American forces he endeavored, but without success, to dispose of his goods. When the place was evacuated they were therefore unavoidably left behind, as nearly all of his mules had been lost in the march and the battle. He himself accompanied the army, fearing that his person would not be safe if he remained behind, as he was particularly obnoxious, it seems, to the Mexicans, because he was a native of Spain, and came with a hostile invading army.

When the Mexican authorities regained possession of the place, the goods of the plaintiff were seized and confiscated, and were totally lost to him. And this action was brought against Colonel Mitchell, the defendant, in the court below, to recover the damages which the plaintiff alleged he had sustained by the arrest and seizure of his property at San Elisario, and taking it from his control and legal possession.

This brief outline is sufficient to show how this case has arisen. The expedition of Colonel Doniphan, and all its incidents, are already historically known, and need not be repeated here.

At the trial in the Circuit Court the verdict and judgment were in favor of the plaintiff; and this writ of error has been brought upon the ground that the instructions to the jury by the Circuit Court, under which the verdict was found, were erroneous.

Some of the objections taken in the argument here, on behalf of the defendant, have arisen from a misconception of the instructions given to the jury. It is supposed that these directions embraced questions of fact as well as of law, and that the court took upon itself the decision of questions arising on the testimony, which it was the exclusive province of the jury to determine. But this is an erroneous construction of the exception taken at the trial. The passages in relation to questions of fact are nothing more than the inferences which in the opinion of the court were fairly deducible from the testimony; and were stated to the jury not to control their decision, but submitted for their consideration in order to assist them in forming their judgment. This mode of charging the jury has always prevailed in the State of New York, and has been followed in the Circuit Court ever since the adoption of the Constitution.

The practice in this respect differs in different States. In some of them the court neither sums up the evidence in a charge to the jury nor expresses an opinion upon a question of fact. Its charge is strictly confined to questions of law, leaving the evidence to be discussed by counsel, and the facts to be decided by the jury without commentary or opinion by the court.

But in most of the States the practice is otherwise; and they have adopted the usages of the English courts of justice, where the judge always sums up the evidence, and points out the conclusions which in his opinion ought to be drawn from it; submitting them, however, to the consideration and judgment of the jury.

It is not necessary to inquire which of these modes of proceeding most conduces to the purposes of justice. It is sufficient to say that either of them may be adopted under the laws of Congress. And as it is desirable that the practice in the courts of the United States should conform, as nearly as practicable, to that of the State in which they are sitting, that mode of proceeding is perhaps to be preferred which, from long established usage and practice, has become the law of the courts of the State. The right of a court of the United States to express its opinion upon the facts in a charge to the jury was affirmed by this court in the case of *M'Lanahan v. The Universal Insurance Co.*, 1 Pet. 182, 7 L. Ed. 98, and *Games v. Stiles*, 14 Pet. 322, 10 L. Ed. 476. Nor can it be objected to upon the ground that the reasoning and opinion of the court upon the evidence may have an undue and improper influence on the minds and judgment of the jury. For an objection of that kind questions their intelligence and independence; qualities which cannot be brought into doubt without taking from that tribunal the confidence and respect which so justly belong to it, in questions of fact.

It was in pursuance of this practice, that the proceedings set forth in the exceptions took place. When the testimony was closed and the questions of law had been raised and argued by counsel, the court stated to them the view it proposed to take of the evidence in the charge about to be given. And it is evident, from the statement in the exception, that this was done for the purpose of giving the counsel for the respective parties an opportunity of going before the jury, to com-

bat the inferences drawn from the testimony by the court, if they supposed them to be erroneous or open to doubt.

It appears from the record that the counsel on both sides declined going before the jury, evidently acquiescing in the opinions expressed by the court, and believing that they could not be successfully disputed. And the judge thereupon charged the jury that if they agreed with him in his view of the facts that they would find for the plaintiff, otherwise for the defendant; and upon this charge the jury found for the plaintiff, and assessed the damages stated in the proceedings. It is manifest, therefore, that the Circuit Court did not, in its instructions, trench upon the province of the jury, and that the jury could not have been misled as to the nature and extent of their own duties and powers. The decision of the facts was fully and plainly submitted to them. And their verdict for the plaintiff, upon the charge given to them, affirms the correctness of the views taken by the court; and the opinions upon the evidence as therein stated must now be regarded as facts found by the jury; and as such are not open to controversy in this court.

This statement of the manner in which the case was disposed of in the Circuit Court was necessary to disengage it from objections which do not belong to it, and to show what questions were decided by the court below, and are brought up by this writ of error. We proceed to examine them.

It is admitted that the plaintiff, against his will, was compelled by the defendant to accompany the troops with the property in question when they marched from San Elisario to Chihuahua; and that he was informed that force would be used if he refused. This was unquestionably a taking of the property, by force, from the possession and control of the plaintiff; and a trespass on the part of the defendant, unless he can show legal grounds of justification.

He justified the seizure on several grounds.

1. That the plaintiff was engaged in trading with the enemy.
2. That he was compelled to remain with the American forces, and to move with them, to prevent the property from falling into the hands of the enemy.
3. That the property was taken for public use.
4. That if the defendant was liable for the original taking, he was released from damages for its subsequent loss, by the act of the plaintiff, who had resumed the possession and control of it before the loss happened.
5. That the defendant acted in obedience to the order of his commanding officer, and therefore is not liable.

The first objection was overruled by the court, and we think correctly.

There is no dispute about the facts which relate to this part of the case, nor any contradiction in the testimony. The plaintiff entered the hostile country openly for the purpose of trading, in company with other traders, and under the protection of the American flag. The inhabitants with whom he traded had submitted to the American arms, and the country was in possession of the military authorities of the United States. The trade in which he was engaged was not only sanc-

tioned by the commander of the American troops, but, as appears by the record, was permitted by the Executive Department of the government, whose policy it was to conciliate, by kindness and commercial intercourse, the Mexican provinces bordering on the United States, and by that means weaken the power of the hostile government of Mexico, with which we were at war. It was one of the means resorted to to bring the war to a successful conclusion.

It is certainly true, as a general rule, that no citizen can lawfully trade with a public enemy; and if found to be engaged in such illicit traffic his goods are liable to seizure and confiscation. But the rule has no application to a case of this kind; nor can an officer of the United States seize the property of an American citizen, for an act which the constituted authorities, acting within the scope of their lawful powers, have authorized to be done.

Indeed this ground of justification has not been pressed in the argument. The defence has been placed, rather on rumors which reached the commanding officer and suspicions which he appears to have entertained of a secret design in the plaintiff to leave the American forces and carry on an illicit trade with the enemy, injurious to the interests of the United States. And if such a design had been shown, and that he was preparing to leave the American troops for that purpose, the seizure and detention of his property, to prevent its execution, would have been fully justified. But there is no evidence in the record tending to show that these rumors and suspicions had any foundation. And certainly mere suspicions of an illegal intention will not authorize a military officer to seize and detain the property of an American citizen. The fact that such an intention existed must be shown; and of that there is no evidence.

The 2d and 3d objections will be considered together, as they depend on the same principles. Upon these two grounds of defence the Circuit Court instructed the jury, that the defendant might lawfully take possession of the goods of the plaintiff, to prevent them from falling into the hands of the public enemy; but in order to justify the seizure the danger must be immediate and impending, and not remote or contingent. And that he might also take them for public use and impress them into the public service, in case of an immediate and pressing danger or urgent necessity existing at the time, but not otherwise.

In the argument of these two points, the circumstances under which the goods of the plaintiff were taken have been much discussed, and the evidence examined for the purpose of showing the nature and character of the danger which actually existed at the time or was apprehended by the commander of the American forces. But this question is not before us. It is a question of fact upon which the jury have passed, and their verdict has decided that a danger or necessity, such as the court described, did not exist when the property of the plaintiff was taken by the defendant. And the only subject for inquiry in this court is, whether the law was correctly stated in the instruction of the court; and whether any thing short of an immediate and impending danger from the public enemy, or an urgent necessity for the public service, can justify the taking of private property by a

military commander to prevent it from falling into the hands of the enemy or for the purpose of converting it to the use of the public.

The instruction is objected to on the ground, that it restricts the power of the officer within narrower limits than the law will justify. And that when the troops are employed in an expedition into the enemy's country, where the dangers that meet them cannot always be foreseen, and where they are cut off from aid from their own government, the commanding officer must necessarily be intrusted with some discretionary power as to the measures he should adopt; and if he acts honestly, and to the best of his judgment, the law will protect him. But it must be remembered that the question here, is not as to the discretion he may exercise in his military operations or in relation to those who are under his command. His distance from home, and the duties in which he is engaged, cannot enlarge his power over the property of a citizen, nor give to him, in that respect, any authority which he would not, under similar circumstances, possess at home. And where the owner has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country, or in his own.

There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.

But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

In deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous, will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say, whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that private rights must for the time give way to the common and public good.

But it is not alleged that Colonel Doniphan was deceived by false

intelligence as to the movements or strength of the enemy at the time the property was taken. His camp at San Elisario was not threatened. He was well informed upon the state of affairs in his rear, as well as of the dangers before him. And the property was seized, not to defend his position, nor to place his troops in a safer one, nor to anticipate the attack of an approaching enemy, but to insure the success of a distant and hazardous expedition, upon which he was about to march.

The movement upon Chihuahua was undoubtedly undertaken from high and patriotic motives. It was boldly planned and gallantly executed, and contributed to the successful issue of the war. But it is not for the court to say what protection or indemnity is due from the public to an officer who, in his zeal for the honor and interest of his country, and in the excitement of military operations, has trespassed on private rights. That question belongs to the political department of the government. Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the question here is, whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it.

The case mentioned by Lord Mansfield, in delivering his opinion in *Mostyn v. Fabrigas*, 1 Cowp., 180, illustrates the principle of which we are speaking. Captain Gambier, of the British navy, by the order of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia, who were supplying the sailors with spirituous liquors, the health of the sailors being injured by frequenting them. The motive was evidently a laudable one, and the act done for the public service. Yet it was an invasion of the rights of private property, and without the authority of law, and the officer who executed the order was held liable to an action, and the sutlers recovered damages against him to the value of the property destroyed.

This case shows how carefully the rights of private property are guarded by the laws in England; and they are certainly not less valued nor less securely guarded under the Constitution and laws of the United States.

We think, therefore, that the instructions of the Circuit Court on the 2d and 3d points were right.

The 4th ground of objection is equally untenable. The liability of the defendant attached the moment the goods were seized, and the jury have found that the plaintiff did not afterwards resume the ownership and possession.

Indeed, we do not see any evidence in the record from which the jury could have found otherwise. From the moment they were taken possession of at San Elisario, they were under the control of Colonel Doniphan, and held subject to his order. They were no longer in the possession or control of the plaintiff, and the loss which happened was the immediate and necessary consequence of the coercion which compelled him to accompany the troops.

It is true, the plaintiff remained with his goods and took care of

them, as far as he could, during the march. But whatever he did in that respect was by the orders or permission of the military authorities. He had no independent control over them.

Neither can his efforts to save them from loss, after they arrived at the town of Chihuahua, by sale or otherwise, be construed into a resumption of possession, so as to discharge the defendant from liability. He had been brought there with the property against his will; and his goods were subjected to the danger in which they were placed by the act of the defendant. And the defendant cannot discharge himself from the immediate and necessary consequences of his wrongful act, by abandoning all care and control of the property after it reached Chihuahua, and leaving the plaintiff to his own efforts to save it. He could not discharge himself without restoring the possession in a place of safety; or in a place where the plaintiff was willing to accept it. And the plaintiff constantly refused to take the risk upon himself, after they arrived at Chihuahua, as well as on the march, and warned Colonel Doniphan that he would not.

Neither can the permission given to the plaintiff to leave the troops and go to the hacienda of Parns, affect his rights. He was then in the midst of the enemy's country, and to leave the American forces at that point might have subjected his person and property to greater dangers than he incurred by remaining with them. The plaintiff was not bound to take upon himself any of the perils which were the immediate consequences of the original wrong committed by the defendant in seizing his property and compelling him to proceed with it and accompany the troops.

The 5th point may be disposed of in a few words. If the power exercised by Colonel Doniphan had been within the limits of a discretion confided to him by law, his order would have justified the defendant even if the commander had abused his power, or acted from improper motives. But we have already said that the law did not confide to him a discretionary power over private property. Urgent necessity would alone give him the right; and the verdict finds that this necessity did not exist. Consequently the order given was an order to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed. The case of Captain Gambier, to which we have just referred, is directly in point upon this question. And upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify.

But in this case the defendant does not stand in the situation of an officer who merely obeys the command of his superior. For it appears that he advised the order, and volunteered to execute it, when, according to military usage, that duty more properly belonged to an officer of inferior grade.

We do not understand that any objection is taken to the jurisdiction of the Circuit Court over the matters in controversy. The trespass, it is true, was committed out of the limits of the United States. But an action might have been maintained for it in the Circuit Court for any

district in which the defendant might be found, upon process against him, where the citizenship of the respective parties gave jurisdiction to a court of the United States. The subject was before this court in the case of McKenna v. Fisk, reported in 1 How. 241, 11 L. Ed. 117, where the decisions upon the question are referred to, and the jurisdiction in cases of this description maintained.

Upon the whole, therefore, it is the opinion of this court, that there is no error in the instructions given by the Circuit Court, and that the judgment must be affirmed with costs.

Mr. Justice DANIEL dissented.

3. HOUGH v. HOODLESS.

(Supreme Court of Illinois, 1864. 35 Ill. 166.)

Appeal from Circuit Court of Cook County.

Action brought originally in justice's court by appellee against appellant, and removed from thence by successive appeals to this court, for the recovery of damages for tearing down and destroying a certain frame building belonging to appellee.

It appeared from the evidence that said building was situated outside of the territory belonging to Camp Douglas and within which martial law had been declared; but was erected on ground which had theretofore been used for purposes of parade and instruction of troops; that said building was torn down and removed by a detachment of soldiers by order of defendant, Col. Hough, who was present when the same was done. Evidence was also introduced tending to show that the ground on which said building was situated was necessary for use in parades of the soldiers in said camp, and that the building was removed as an obstruction preventing its use for that purpose. * * *

BREESE, J. This is an action brought before a justice [172*] of the peace of Cook county, and taken by appeal to the circuit court, where a verdict and judgment were had by the plaintiff against the defendant, who brings the case here by appeal.

The evidence shows conclusively that the plaintiff was in possession of this property at the time the trespass was committed. That he hauled the materials to the lot and erected the building. It is proved the premises were beyond the military lines marked out for Camp Douglas, and that the property was destroyed by order of the defendant. The evidence seems to make a case of causeless and willful destruction, as the building was light and could have been easily moved on rollers. No justification of any kind whatever is shown or attempted to be set up.

The judgment must be affirmed.

Judgment affirmed.

4. TRAMMELL, v. BASSETT.

(Supreme Court of Arkansas, 1866. 24 Ark. 499.)

Mr. Justice CLENDENIN delivered the opinion of the court.

On the 28th of July, 1865, the appellee, Bassett, commenced his action of trespass, against the appellants Leonard Trammell, George S. Trammell and Baker Pidcock, Daniel T. Smith, Jackson Dyer and George W. Drain. At the May term, 1866, all the defendants appeared. Smith filed his plea in abatement, and the other defendants their plea of not guilty, and also special pleas of justification. The plaintiff admitted the truth of Smith's plea, and he was discharged. The plaintiff joined issue on the plea of not guilty, and demurred to each and all of the special pleas. The demurrer was sustained, and defendants then filed their plea of the statute of limitations, upon which issue was made up, and on the application of the defendants the cause was continued.

At the next term of the court in August, 1866, defendants, Leonard Trammell, Dyer and Drain, filed an additional special plea, and at the same time, defendants, Pidcock and Dyer filed an additional plea, and defendant George S. Trammell, also, filed his additional special plea, all of which said pleas the plaintiff moved to strike from the files, the motion was sustained, and the pleas stricken from the files, to which defendants excepted, and incorporated their pleas in the bill of exceptions. The case was then submitted to a jury, and a verdict found against defendants, Leonard Trammell and George S. Trammell, and in favor of Pidcock, Dyer and Drain. During the trial, the defendants excepted to decisions of the court, in regard to the admission and exclusion of testimony, and also to instructions given by the court; all of which exceptions appear by the record of the case. Leonard and George S. Trammell appeal to this court and assign for error:

1st. The circuit court erred in sustaining the demurrer to the several pleas of justification. * * *

This plea, in substance, set up the existence of a civil war, that the defendants were soldiers in that war; and that the acts done were done by order of their commanding officer (naming him); and presents the question whether a private soldier in time of war can justify his acts by virtue of the orders of his commanding officer.

That a civil war existed at the period shown by the pleadings in this case, there can be no question. We have, at the present term of this court, in the case of *Hawkins v. Filkins*, 24 Ark. 286, fully recognized and decided that point; and therefore, there being a war, and these defendants being soldiers in that war, what was their duty?

We think it may be laid down as a well settled proposition, that obedience is the first duty of a soldier. It is not for him to ask the reason for the order he receives, or the act he is to do, or to consider the consequences of the act. He must obey. To him the maxim of despotism, that "to hear is to obey," is more nearly applicable than to any other class of society. If such be the rule applicable to the private soldier, he should certainly be permitted to prove it in his justification.

It is no doubt upon this principle that the law holds officers to a more strict account for acts done by them, than it does the private soldier, and that officers have a discretion in effecting that which they are required to perform. And this question incidentally came up before this court at the present term in the case of *Taylor v. Jenkins*, 24 Ark. 337, 88 Am. Dec. 773, in which the court say: "and while officers may exercise a discretionary power in effecting that which they are required to do, soldiers under their command have no such discretion; they act under orders, are in fact the instruments through which orders are carried into effect." Vattel says: "The troops, officers and soldiers, and in general all of those by whose agency the sovereign makes war, are only instruments in his hands to execute his will and not their own," which we again repeat and re-affirm as the law applicable to the question now before us. And applying it to the pleas in this case we think the circuit court erred in sustaining the demurrer to the pleas.

5. *BELL v. LOUISVILLE R. CO.*

(Court of Appeals of Kentucky, 1866. 1 Bush [64 Ky.] 404, 89 Am. Dec. 632.)

ROBERTSON, J., delivered the opinion of the court.

General John H. Morgan, of the Confederate army, having penetrated Kentucky with a strong military force and captured Cave City, near the Louisville & Nashville railroad, on the 10th day of May, 1862, awaited the transit of the train, and, on the same day, with the coerced co-operation of the appellant, and other soldiers under his command, burnt a locomotive and two passenger cars, and destroyed or materially damaged several other cars, for which the appellee sued the appellant as a trespasser, and recovered a judgment for fifteen thousand dollars, which, by this appeal, he seeks to reverse.

Waiving all consideration of several preliminary objections as not needful, we must reverse the judgment for radical error in instructing and refusing to instruct the jury, and in overruling a motion for a new trial sought on that ground, and also on the ground that the verdict was against the law and evidence of the case.

That the insurgent party in a civil war has some belligerent rights is neither denied nor consistently deniable; nor can a jurist deny that, on the 10th of May, 1862, the rebellion had matured into an actual and universally recognized civil war. And it was so adjudged by this court, not only in the case of *Bland v. Adams Express Company* (1 Duv. [Ky.] 232, 85 Am. Dec. 623), but also unanimously by the supreme court of the United States in the prize cases reported in 2 Black.

We need not here discuss the question whether both parties to a civil war have co-equal belligerent rights, nor the question whether or how far there may be any authoritative discrimination between belligerent rights in a civil and those in an international war; for the admitted laws of all civilized warfare entitle each party in a civil war to the same right of capture and destruction of enemy's property,

and show that when either the capture or destruction of property by one of such belligerents is lawful, it is equally lawful by the other; and, if unlawful by one, it would be equally so by the other.

In his treatise on the laws of war, Halleck (chap. 19, sec. 22, p. 464) says: "While there is some uncertainty as to the exact limit fixed by the voluntary law of nations as to our right to appropriate to our own use the property of an enemy, or to subject it to military contributions, there is no doubt whatever respecting its waste and useless destruction. This is forbidden alike by the law and the rules of war. But if such destruction is necessary in order to cripple the enemy or to insure our own success, it is justifiable. We may destroy provisions or forage in order to cut off the enemy's subsistence; but we cannot destroy vines and cut down fruit trees without being looked upon as savage barbarians. We may demolish fortresses, ramparts, and all structures solely devoted to the purposes of war; but we cannot destroy public or private edifices of a civil character, temples of religion and monuments of art, unless their destruction become necessary in the operations of a siege, or in order to prevent affording a lodgment or protection to the enemy." Perfectly coincident with the same doctrine is the following extract from the decision of the supreme court in the prize cases: "The right of one belligerent not only to coerce the other by direct force, but also cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war." * * *

The decisive question in this case is, whether the destruction of the cars by Morgan's authority was a wanton waste, or was for crippling his enemy and cutting off his supplies; and the facts authorize the deduction that it was done for the latter and legitimate purpose.

Gen. Buell's Federal army, then occupying Tennessee, confronted on the south by Bragg's Confederate army, depended chiefly for transportation of troops and supplies of munitions and provisions on the Louisville and Nashville railroad. To cut off or obstruct this indispensable avenue of supplies was an obvious stroke of southern policy to compel Gen. Buell to fall back on Kentucky and thus make her the seat of war.

This railroad was then, and for some time had been, transporting troops and other supplies to Gen. Buell, and some of the cars thus used belonged to the Federal Government.

How, then, can we doubt that the act complained of in this suit was, according to the laws of civil war, a lawful exercise of a belligerent right? We cannot resist that conclusion. * * *

In the state of case as thus outlined, the court gave to the jury the following instruction:

"If the jury believe from the evidence in this case that the defendant Bell set fire to plaintiff's car and other property, from which the same was destroyed, or was present and aided in doing so, they should find for the plaintiff such damages as was sustained by the destruction so done, unless they further believe that said defendant was forced against his will to join Morgan's forces, and done what he did towards the burning, if anything, by compulsion."

And refused to give the following instruction asked by the appellant:

"If the jury believe from the evidence that W. F. Bell set fire to the cars of plaintiff, but believe that he was a soldier of the so-called Confederate army, and was acting in obedience to the command of his superiors, John Morgan and others, and believe that plaintiff was employed by the United States government in May, 1862, for carrying ammunition, implements of war, soldiers, and provisions, to United States army, they will find for the defendant, W. F. Bell."

Tested by the foregoing facts and principles as herein recognized, the circuit court erred in giving the first instruction, and also in refusing the last. And, moreover, the law and evidence, which ought to have controlled the verdict, did not authorize that on which the judgment was pronounced; and, consequently, the court erred in overruling the appellant's motion for a new trial.

For reasons suggested in *Price and Price v. Poynter*, 1 Bush, 387, 89 Am. Dec. 631, Judge WILLIAMS does not concur in this opinion.

Wherefore (Judge WILLIAMS dissenting), the judgment is reversed, and the cause remanded for a new trial.

6. DREHMAN v. STIFEL.

(Supreme Court of Missouri, 1867. 41 Mo. 184, 97 Am. Dec. 268.)

HOLMES, J., delivered the opinion of the court.

This was an action of forcible entry and detainer upon a complaint made before a justice of peace under the statute. The case comes here by appeal from the St. Louis Circuit Court. The proceedings were commenced in September, 1863. After several trials before the justice, and a recovery, at last, of some \$7,000 damages, an appeal was taken to the Circuit Court, where it was tried again in May, 1866, after the passage of the ordinance of 1865, relating to such suits, which had been pleaded in bar, and a verdict and judgment were rendered for the defendant. The questions for consideration here arise mainly upon the instructions which were given or refused by the court below.

Divested of all extraneous irrelevant matters, the substance of the case made on the facts may be stated as follows:

Some time in the first half of June, 1861, during the first uprising of rebellion in Missouri, and in a time of civil commotion, great peril and actual war, while General Lyon had command at the Arsenal and post of St. Louis, a regiment of Home Guards under Col. Stifel (the defendant here), by order of the commanding officer of the post, occupied a certain brewery building in the tenth ward of the city as their camp and headquarters, and as a position for the defense of the city and the protection of the community against insurrectionary violence. This brewery belonged to the defendant. A two-story building on the adjoining lot, belonging to the plaintiff, had twice taken fire and was partly burned, and being rendered untenable, was vacated by the plaintiff, who left the premises under the charge of an agent residing in the neighborhood. Nobody was in the actual occupation of the premises.

Upon a suggestion made by the defendant, as colonel in command, to the commanding officer, at the Arsenal, his adjutant was sent to examine the premises, with a view of putting the position in a state of military defense (as the adjutant himself states) and to report their condition. Upon the report of this officer a positive verbal order was given to him by the general in command, to examine the place again in company with the general officer commanding that immediate district, and, with his approval, to have these burnt ruins pulled down and removed, and to have all the grounds adjoining the building smoothed off for a parade ground and other military uses. After consulting fully with the general and other regimental commanders as to what was necessary to be done (as he says) with reference to putting all the posts in a state of military defense, the order was given the defendant, under which, as expressly directed, he seized the premises for public use, and proceeded to remove the ruins and clear the ground. The premises were occupied by this regiment for some time, but were evacuated by the military forces before the first day of January 1862, and were not, after that date, claimed or occupied by the defendant, though the enclosure erected by the military authorities still remained there.

The plaintiff offered some evidence tending to show that the defendant owned the brewery, and had some time previously purchased the reversion of the plaintiff's lease of this lot, had refused to accept rent from the plaintiff, and had desired to purchase his lease. This evidence was properly excluded as irrelevant and immaterial. It had no direct bearing upon the issue, and could only tend to mislead the jury. Some slight circumstances having a like tendency were stated by some of the witnesses for the plaintiff, upon which his counsel have endeavored to construct a theory respecting the conduct and motives of the defendant, which, so far as we are able to discover from anything contained in the record, would seem to be in great part imaginary or wholly unfounded, and not at all warranted by the evidence produced, to the effect that the military order was procured by the defendant for a malicious or selfish purpose, and was a mere cover for his own private ends, and that the acts done were not done by virtue of any lawful military authority, nor upon any immediate and pressing danger, or upon any urgent necessity for taking private property for public use, but were an arbitrary abuse of military power, and, in fact, a lawless invasion of private property for individual purposes, without any military authority whatever. The plaintiff appears to have proceeded on the assumption that the Home Guards were an unauthorized military force, and that the acts of these officers were to be regarded as trespasses and forcible entries, and that the personal relations and individual transactions of these parties were admissible in evidence on the issues in the case. It is not apparent how the justification of a military officer for acting in obedience to positive orders can in any manner depend upon his private relations with the parties whose property happens to be taken for public use. We deem it unnecessary to dwell upon this part of the case. It is not otherwise important than in reference to the instructions. We are not well satisfied that there was any competent evidence before the jury which could have warranted them in finding the fact according to the theory supposed, but the instructions

will be considered on the supposition that there was some evidence tending that way.

The principal instruction refused for the plaintiff proceeds upon the law, as it was laid down in *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75, that the existence of some pressing danger or urgent military necessity was a question of fact for the jury to determine.

The defendant's instructions, which were given, appear to have been framed with reference to the ordinance passes in Convention on the 17th of March, 1865, and subsequently incorporated into the Constitution of the State. Const. art. 11, § 4. It reads as follows:

"No person shall be prosecuted in any civil action or criminal proceeding, for, or on account of any act by him done, performed, or executed, after the first day of January, one thousand eight hundred and sixty-one, by virtue of military authority vested in him by the Government of the United States, or that of this State, to do such act, or in pursuance of orders received by him from any person vested with such authority; and if any action or proceeding shall have heretofore been, or shall be hereafter instituted against any person for the doing of any such act, the defendant may plead this section in bar thereof."

The purport of these instructions was, that nothing was to be left to the jury to find, but the fact, whether or not the acts of forcible entry and detainer complained of were done after the first day of January, 1861, and by virtue of military authority vested in the defendant, or in pursuance of an order received by him from a person vested with such authority under the Government of the United States; that it was immaterial in such case, at whose instance or under what circumstances of military necessity the order was issued, and that if the acts were done by virtue of such military authority, or in obedience to such orders, it made no difference whether or not an urgent or pressing military necessity were otherwise proved; in short, that the existence of a military necessity in such cases was not a matter of fact for the jury to determine, but a matter of law for the court under this ordinance, and upon the evidence adduced.

So far as this ordinance affects the plaintiff's case, it may be conceded that it operates to make such military orders and authority a complete justification for the acts done by the defendant in pursuance thereof, and to take away from the jury all consideration of the question whether there existed, in fact, any immediate and pressing military necessity for the issuing of such orders, and that it so far deprives the plaintiff of any right to recover damages from the defendant for acts done by virtue of such military authority, or in obedience to such orders; but the questions whether such military authority or orders existed, in fact, or whether the acts complained of were actually done by virtue of such authority or orders, or whether they were done maliciously or for private and selfish ends, using the authority or orders as a mere pretence or cover, or were an arbitrary abuse or a willful misuse of power for other purposes than those contemplated by such authority or orders, may still be a matter of fact for a jury to determine, under the ordinance.

So far as the ordinance operates retroactively upon the plaintiff's case, it may be said to deprive him of his right to recover, but it does

not take away nor infringe any vested right of property. A right to recover damages in an action of forcible entry and detainer is not a vested right of property.

The Federal Constitution does not prohibit a State from passing retrospective ordinances of a civil nature, which merely take away a right of action or only divest rights vested by law in an individual, if it does not impair the obligation of a contract, nor divest settled rights of property. The ordinance is not, therefore, in this respect unconstitutional. *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648; 2 Sto. Const. 1398; *Smith's Const. Law*, 266, 267, 378. That it is a bill of attainder, as contended, there cannot be any rational pretence. There is nothing in it that relates to proceedings of a criminal nature in a sense of a bill of attainder, nor does it confiscate private property, nor punish anybody. It is rather an act of indemnity, oblivion, and pardon; of indemnity, in so far as it makes military orders and authority a justification for acts done by virtue thereof; of oblivion and pardon, in so far as it prohibits criminal prosecutions for acts done by such authority. It is not necessarily inconsistent with anything contained in the bill of rights in the same Constitution. The Legislation, only, is prohibited from passing retrospective laws (Art. 1, Const., § 28); this is an ordinance of the people in their sovereign capacity, founding a civil government. They had the power to define how much of the rights and liberty of the citizen he should be required to surrender for the public good, and there was no other limit of positive law upon this power but the prohibitions of the Federal Constitution, which do not reach this case. If this ordinance be deemed an unwise abridgment of the rights and liberties of the citizen, or whenever it shall be thought to operate oppressively or unjustly, the remedy lies with the people in the power of amendment. We have only to declare the law as we find it.

There is no evidence of any actual appropriation of the plaintiff's property beyond the military occupation of the premises and the waste committed in clearing the ground for the use of camps and quarters. When the military occupation ceased there was nothing to prevent the plaintiff from retaking possession; or, if any private individual retained the possession, he had his action of unlawful detainer, on demand made in writing under the statute, or his action of ejectment to recover the possession. His right of property in the lease was not taken away. The military possession for the public use was merely temporary. For this use of his lot, as well as for the value of the property destroyed, he was entitled to look to the Government for compensation. He seems to have preferred to consider the whole proceeding as an individual trespass, a forcible entry and detainer by a private person, and an unlawful appropriation of the property in his individual capacity and for his own purposes, and wholly to ignore the military authorities. It is not a little remarkable that he should neglect to make an effort to regain the possession when the military forces evacuated the premises, but should resort to this form of action against the defendant nearly two years after that event. He is now seeking to recover, by way of damage, double the amount to be assessed as damages for the forcible entry and detainer, for the value of the prop-

erty wasted, and for all rents and profits up to the finding of a verdict under a statute which was made for the protection of the citizen against forcible invasion of private property by an individual, acting altogether without any authority of law.

Now, it would seem to be reasonable that, in order to make this statute applicable to a military officer acting under express orders from the highest military authorities, in time of civil war, and under circumstances of great public peril, in the midst of a treasonable insurrection, when speedy action and the utmost energy were required, the clearest proofs of the want of lawful authority, of an arbitrary abuse of power, and a plain perversion of military orders to malicious purposes or selfish private ends, ought to be demanded. Even if this were a case in which the existence of pressing danger or urgent necessity were to be submitted to a jury as a matter of fact, where the officer produces unequivocal evidence of both military authority and express orders for what was done in justification of his acts, something like direct and positive evidence to the contrary ought to be expected. It may be that the plaintiff was not aware of any urgent necessity. A sagacious military commander is apt to see necessities that are not apparent to everybody. It is probable that there were a great many who saw no military necessity for the capture of Camp Jackson, but a short time before this transaction, until long after it was taken. The mere fact that personal relations of no very friendly character existed between these parties, or that the defendant was personally interested in this property, while it may tend to explain the course taken by the plaintiff, furnishes no satisfactory evidence of an abuse of power for private ends; nor was there any evidence tending to show that no such military exigencies existed, or that these premises were not needed for the public use. On the other hand, there was direct and positive evidence that two military officers, besides the defendant, on personal inspection of the position, made report of the military necessity of what was ordered to be done. Not only the existence of military orders, but the existence of military necessity which justified them, was distinctly proved.

There is a wide difference between this case and those which have been cited on behalf of the plaintiff. Where a naval commander under the orders of the admiral had pulled down the houses of some sutlers, who sold liquors to the sailors, on the coast of Nova Scotia, he was held liable to an action for damages, because there was not the slightest pretence of any military necessity, nor was the act within the scope of military authority. 1 Cowp. 180.

In *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75, there was no pressing danger from the enemy, nor any occasion whatever for taking the private property for public use, but it seems to have been seized because it was thought it might contribute to insure the success of a distant expedition on which the officer was about to march. The jury had found the fact to be so, and the court held this was a question of fact for the jury to determine. The orders were proven, but the evidence showed that neither the orders nor the act were justified under military authority in that state of the case.

This verdict might stand upon the law as laid down in that case, if

it had been found under instructions to the same effect. It recognized the law to be, that a military officer, charged with a particular duty, might impress private property into the public service, or take it for the public use, and that the Government would be bound to make compensation; but that the officer should not be regarded as a trespasser when an urgent necessity was shown to exist, and that he would be justified in acting upon the information of others, as well as his own observation, affording a reasonable ground of belief that the peril was immediate or the necessity urgent, though it should turn out to have been erroneous or unfounded, and that he would not be a trespasser; but it was also held to be a matter of fact for the jury to determine, whether such emergency existed or not.

Now the only effect that need be given to the ordinance, in order to make it cover this case, and justify the instructions which were given for the defendant, is this: That when the military authority and orders are made to appear, the existence of the emergency or military necessity shall be deemed to be conclusively proved and established by the judgment of the officer, and shall be presumed as a matter of law. It operates so far to change the rules of evidence. It makes that a justification and a defence which would not have been such before without further proof. In this, it is not unlike those statutes which make certain facts proven to have the effect to raise a conclusive presumption of negligence or liability. The military necessity only is thus conclusively presumed, but the question whether the military authority or orders existed in fact, or whether the acts complained of were really done by virtue of such authority, or were the acts of the individual in his private capacity, or were an abuse of power or a perversion of orders for private ends or malicious purposes, would be still open for determination by the jury. The evidence thus far makes a change in the law as it stood before, but we do not think it is for this reason unconstitutional.

The first three instructions which were given for the defendant, left to the jury to say whether these officers had military authority under the United States, and whether the acts of the defendant in the premises were done in pursuance of orders issued by such authority. They took away from the jury the consideration of the military necessity and nothing more. We think the instructions were correct, and that the verdict was fully justified by the evidence.

The fourth instruction for the defendant proceeded upon the ground that a detention of the premises by the defendant, as a private individual, after the military evacuation, would be an unlawful detainer only, and would not sustain an action for a forcible entry and detainer. In such case a demand in writing for the possession and a refusal would be necessary to give a cause of action under the statute. Such detainer would only amount to a disseizin. *Spalding v. Mayhall*, 27 Mo. 377; R. C. 1855, p. 787, 3. We see no material objection to the instruction.

The fourth and fifth instructions, which were refused for the plaintiff, are sufficiently disposed of by what has been said above.

The sixth instruction was rightly enough refused, for the reason that the military authority was amply proved, and there was no evi-

dence to the contrary, and though it might have been given, its refusal could do no prejudice to the rights of the plaintiff. The same question of fact was submitted to the jury in the instructions which were given. There was no error in this of which the plaintiff can complain.

As to the plaintiff's seventh instruction, it may be observed that no objection was taken in the course of the trial to the admissibility of the evidence that was produced by the defendant to prove the military authority and the orders, and being once admitted without objection, even if any valid objection could have been taken, the court very properly refused to exclude it from the jury by an instruction at the close of the case.

The eighth instruction refused needs no further consideration. There was no possible ground on which the ordinance could be called a bill of attainder.

There being no error that can entitle the plaintiff to a reversal, the judgment will be affirmed. The other judges concur.

7. LEWIS v. MCGUIRE.

(Court of Appeals of Kentucky, 1867. 3 Bush [66 Ky.] 202.)

WILLIAMS, J., delivered the opinion of the court.

As decided by this court in a recent opinion, in *Terrill v. Rankin*, 2 Bush, 453, 92 Am. Dec. 500, to justify the taking of property from a non-combatant citizen of Kentucky by a military officer, it must appear that it was done under a legitimate proceeding and exercise of the power of impressment, or of military contribution, or exercise of some other legitimate belligerent right.

That neither the laws of war nor of nations authorize indiscriminate plunder; and that, as Kentucky was recognized as one of the family of the "Confederate States" by that government, it precluded itself and all its officers and agents from regarding the soil of Kentucky as enemies' country, or treating her non-combatant citizens as enemies; consequently, that government, its officers and agents, could only exercise belligerent rights against that portion of the citizens of Kentucky who, by their own conduct, became actual belligerents.

Neither the right of impressment nor the right to exact military contributions belongs to every petty military officer, but must come from the commander of a district of country, or a post, or an army, and not from every straggling squad who may be under the immediate command of some inferior officer of low grade. Nor, indeed, will either the commission or capacity in which an officer professes to act fix his status, but the manner of his conduct; for even a regularly commissioned officer, in the regular military service of a belligerent, may be guilty of such a line of conduct as to show he in reality belongs to an irregular, irresponsible, plundering service, which cannot be shielded by a regular commission.

The rules of civilized warfare are founded upon principles of humanity and justice, and, when administered in an enlightened manner,

mitigate the calamities of war; and, when properly observed by both the belligerent and non-combatant, prevent the disastrous destruction which attended the wars of a less civilized and Christianized age.

It is not only the privilege of the non-combatant to remain at home to take care of his property and family, when an alien belligerent shall, for the time being, oust the military power of his own government, but it is his duty to yield what the law of nations terms temporary allegiance to such predominating power; and, whilst this does not require at his hands voluntary aid to such belligerent alien power, yet it is his duty to yield it obedience in good faith, and for this he is entitled to its protection against indiscriminate plunder or the levy of irregular contributions; and if this be so as to an alien belligerent power, how much more forcibly does the duty of protection apply to a government and its officers who claim the territory as part of its own dominions.

The evidence in this case strongly indicates that Capt. Cook and the defendant, his lieutenant and brother-in-law, by a line of conduct of several months' duration, belong to an irregular and irresponsible service, neither authorized nor sanctioned by the Confederate Government nor the officer to whose command he professed to belong; but, on the contrary, he was under charges at the time he was killed by Confederate soldiers.

The second and third instructions given were at war with these principles, and misdirected the jury.

Wherefore the judgment is reversed, with directions for a new trial and further proceedings in accordance to this opinion.

8 BATES v. CLARK.

(Supreme Court of the United States, 1877. 95 U. S. 204, 24 L. Ed. 471.)

Mr. Justice MILLER delivered the opinion of the court.

The plaintiff in error, Bates, was a captain in the army of the United States, in command at Fort Seward, in the Territory of Dakota, near the crossing of the James River by the North Pacific Railroad; and Yeckley, the other plaintiff in error, was a lieutenant under him at the time of the commission of the trespass for which the judgment in this case was recovered against them. The defendants in error, plaintiffs below, were doing a general mercantile business on the James River, also near said crossing, when a lot of whiskey, part of their stock of goods, was seized by defendants. They brought this action to recover damages for the trespass. The defendants pleaded their official character. * * * They also set up an order of the commanding officer of the department of Dakota. * * *

It is a sufficient answer to the plea, that the defendants were subordinate officers acting under orders of a superior, to say that whatever may be the rule in time of war and in the presence of actual hostilities, military officers can no more protect themselves than civilians in time of peace by orders emanating from a source which is itself without authority. The authority of the commandant of the post in the case was precisely the same as the Indian agent or sub-agent, or

superintendent; and it will hardly be maintained that if either of them, wholly mistaking their powers, had seized the goods, he would have incurred no liability. * * *

Judgment affirmed.

9. DOW v. JOHNSON.

(Supreme Court of the United States, 1879. 100 U. S. 158, 25 L. Ed. 632.)

Error to the Circuit Court of the United States for the District of Maine.

The facts are stated in the opinion of the court.

Mr. Justice FIELD delivered the opinion of the court.

The defendant in the court below, the plaintiff in error here, Neal Dow, was a brigadier-general in the army of the United States during the late civil war, and in 1862 and 1863 was stationed in Louisiana in command of Forts Jackson and St. Philip, on the Mississippi River, below New Orleans. These forts surrendered to the forces of the United States in April, 1862. The fleet under Admiral Farragut had passed them and reached New Orleans on the 25th of the month, and soon afterwards the city was occupied by the forces of the United States under General Butler. On taking possession of the city, the General issued a proclamation, bearing date on the 1st of May, 1862, in which, among other things, he declared that until the restoration of the authority of the United States the city would be governed by martial law; that all disorders, disturbances of the peace, and crimes of an aggravated nature, interfering with the forces or laws of the United States, would "be referred to a military court for trial and punishment;" that other misdemeanors would be subject to the municipal authority, if it desired to act; and that civil causes between parties would "be referred to the ordinary tribunals." Under this proclamation, the Sixth District Court of the City and Parish of New Orleans was allowed to continue in existence, the judge having taken the oath of allegiance to the United States.

In January, 1863, General Dow was sued in that court by Bradish Johnson, the plaintiff in this case. The petition, which is the designation given in the system of procedure in Louisiana to the first pleading in a civil action, set forth that the plaintiff was a citizen of New York, and for several years had been the owner of a plantation and slaves in Louisiana, on the Mississippi River, about forty-three miles from New Orleans; that on the 6th of September, 1862, during his temporary absence, the steamer "Avery," in charge of Captain Snell, of Company B of the Thirteenth Maine Regiment, with a force under his command, had stopped at the plantation, and taken from it twenty-five hogsheads of sugar; and that said force had plundered the dwelling-house of the plantation and carried off a silver pitcher, half a dozen silver knives, and other table ware, the private property of the plaintiff, the whole property taken amounting in value to \$1,611.29; that these acts of Captain Snell and of the officers and soldiers under his command, which the petition characterized

as "illegal, wanton, oppressive, and unjustifiable," were perpetrated under a verbal and secret order of Brigadier-General Neal Dow, then in the service of the United States, and in command of Forts Jackson and St. Philip, who, by his secret orders, which the petition declared were "unauthorized by his superiors, or by any provision of martial law, or by any requirements of necessity growing out of a state of war," wantonly abused his power, and inflicted upon the plaintiff the wrongs of which he complained; and therefore he prayed judgment against the General for the value of the property.

To this suit General Dow, though personally served with citation, made no appearance. He may have thought that during the existence of the war, in a district where insurrection had recently been suppressed, and was only kept from breaking out again by the presence of the armed forces of the United States, he was not called upon by any rule of law to answer to a civil tribunal for his military orders, and satisfy it that they were authorized by his superiors, or by the necessities growing out of a state of war. He may have supposed that for his military conduct he was responsible only to his military superiors and the government whose officer he was.

Be that as it may, or whatever other reason he may have had, he made no response to the petition; he was therefore defaulted. The Sixth District Court of the Parish of New Orleans did not seem to consider that it was at all inconsistent with his duty as an officer in the army of the United States to leave his post at the forts, which guarded the passage of the Mississippi, nearly a hundred miles distant, and attend upon its summons to justify his military orders, or seek counsel and procure evidence for his defence. Nor does it appear to have occurred to the court that, if its jurisdiction over him was recognized, there might spring up such a multitude of suits as to keep the officers of the army stationed in its district so busy that they would have little time to look after the enemy and guard against his attacks. The default of the General being entered, testimony was received showing that the articles mentioned were seized by a military detachment sent by him and removed from the plantation, and that their value amounted to \$1,454.81. Judgment was thereupon entered in favor of the plaintiff for that sum, with interest and costs. It bears date April 9, 1863.

Upon this judgment the present action was brought in the Circuit Court of the United States for the District of Maine. The declaration states the recovery of the judgment mentioned, and makes profert of an authenticated copy. To it the defendant pleaded the general issue, nul tiel record, and three special pleas. The object of the special pleas is to show that the District Court had no jurisdiction to render the judgment in question, for the reason that at the time its district was a part of the country in insurrection against the government of the United States, and making war against it, and was only held in subjection by its armed forces. It is not important to state at length the averments of each of these pleas. It will be sufficient to state the material parts of the second plea and a single averment of the third. The second plea, in substance, sets up that as early as February, 1861, the State of Louisiana adopted an ordinance of secession, by which she attempted to withdraw from

the Union and establish an independent government; that from that time until after April 9, 1863, the date of the judgment in question, she was in rebellion against the government of the United States, making war against its authority; that in consequence the military forces of the United States engaged in suppressing the rebellion took forcible possession of that portion of the State comprising the district of the Sixth District Court of New Orleans, and held military occupation of it until long after April 9, 1863, during which time martial law was established there and enforced; that the defendant was then a brigadier-general in the military service of the United States, duly commissioned by the President, and acting in that State under his orders and the articles of war; that by the general order of the President of July 22, 1862, military commanders within the States of Virginia, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, and Arkansas were directed, in an orderly manner, to seize and use any property, real or personal, which might be necessary or convenient for their several commands as supplies, or for other military purposes; that the defendant, in the performance of his duty as a brigadier-general, was in command of troops of the United States in Louisiana; and that the troops by his order seized from the plaintiff, then a citizen of that State, certain chattels necessary and convenient for supplies for the army of the United States, and other military purposes; and that for that seizure the action was brought in the Sixth District Court of New Orleans against him, in which the judgment in question was rendered; but that the District Court had no jurisdiction of the action or over the defendant at its commencement, or at the rendition of the judgment.

The third plea also avers that, for the purpose of suppressing the rebellion and restoring the national authority, the government of the United States, through its proper officers, declared and maintained martial law in Louisiana, from May 1, 1862, until long after the 9th of April, 1863, and deprived all the courts in that State, including the Sixth District Court of New Orleans, of all jurisdiction, except such as should be conferred on them by authority of the officer commanding the forces of the United States in that State, and that no jurisdiction over persons in the military service of the United States, for acts performed in the line of their duty, was by such authority conferred upon that court.

To the first plea, that of nul tiel record, the plaintiff replied that there was such a record, of which he prayed inspection; and the record being produced, the court found in his favor. To the special pleas the plaintiff replied that the District Court had lawful jurisdiction over parties and causes of action within its district at the time and place mentioned, and to render the judgment in question. To the replication the defendant demurred; and upon the demurrer two questions arose, upon which the judges in the Circuit Court were opposed in opinion, namely: 1st, whether the replication is a good and sufficient reply to the special pleas; and, 2d, whether the Sixth District Court, at the time and place mentioned, had jurisdiction of the parties and cause of action, to render the judgment in question.

By statute, when the judges of the Circuit Court are opposed in opinion upon any question arising on the trial of a cause, the opinion

of the presiding justice prevails, and judgment is entered in conformity with it. Here the presiding justice was of opinion that the replication was a sufficient reply to the special pleas, and that the District Court had jurisdiction over the parties and the cause, and to render the judgment in question. Accordingly, the plaintiff had final judgment upon the demurrer, which was entered for \$2,659.67 and costs; and the defendant has brought the cause here by writ of error on a certificate of division of opinion.

The important question thus presented for our determination is, whether an officer of the army of the United States is liable to a civil action in the local tribunals for injuries resulting from acts ordered by him in his military character, whilst in the service of the United States, in the enemy's country, upon an allegation of the injured party that the acts were not justified by the necessities of war.

But before proceeding to its consideration there is a preliminary question of jurisdiction to be disposed of. The act of Feb. 16, 1875, "to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes," provided, that whenever by the laws then in force it was required that the matter in dispute should exceed the sum or value of \$2,000, exclusive of costs, in order that the judgments and decrees of the circuit courts of the United States might be re-examined in the Supreme Court, such judgments and decrees thereafter rendered should not be re-examined in the Supreme Court, unless the matter in dispute should exceed the sum or value of \$5,000, exclusive of costs. 18 Stat. 315 (Comp. St. 1916, §§ 1585, 1586). It is therefore contended that a judgment cannot be reviewed by this court, upon a certificate of division of opinion between the judges of the Circuit Court, if the judgment be under \$5,000; and the judgment in the present case is under that amount. We do not think, however, that this conclusion is warranted by the language of the act in question. That act makes no change in the previous laws, except as to amounts necessary to give the court jurisdiction, when the amount is material. Where before \$2,000 was the sum required for that purpose, afterwards \$5,000 was the sum. But before that act questions arising in the progress of a trial could be brought to this court for determination upon a certificate of division of opinion, without reference to the amount in controversy in the case. The original act of 1802, allowing this mode of procedure, was always held to extend our appellate jurisdiction to material questions of law arising in all cases, criminal as well as civil, without regard to the amount in controversy or the condition of the litigation. Its defect consisted in the delays it created by frequently suspending proceedings in the midst of a trial. To obviate this defect the first section of the act of June, 1872, was passed, requiring the case to proceed notwithstanding the division, the opinion of the presiding justice to prevail for the time being; and this feature is retained in the Revised Statutes. Sects. 650, 652, 693. The benefit of the certificate can now be had after judgment upon a writ of error or appeal. That is the only material change from the original law. We have no doubt, therefore, of our jurisdiction in this case.

This brings us to the consideration of the main question involved, which we do not regard as at all difficult of solution, when reference is had to the character of the late war. That war, though not between independent nations, but between different portions of the same nation, was accompanied by the general incidents of an international war. It was waged between people occupying different territories, separated from each other by well-defined lines. It attained proportions seldom reached in the wars of modern nations. Armies of greater magnitude and more formidable in their equipments than any known in the present century were put into the field by the contending parties. The insurgent States united in an organization known as the Confederate States, by which they acted through a central authority guiding their military movements; and to them belligerent rights were accorded by the Federal government. This was shown in the treatment of captives as prisoners of war, the exchange of prisoners, the release of officers on parole, and in numerous arrangements to mitigate as far as possible the inevitable suffering and miseries attending the conflict. The people of the loyal States on the one hand, and the people of the Confederate States on the other, thus became enemies to each other, and were liable to be dealt with as such without reference to their individual opinions or dispositions. Commercial intercourse and correspondence between them were prohibited, as well by express enactments of Congress as by the accepted doctrines of public law. The enforcement of contracts previously made between them was suspended, partnerships were dissolved, and the courts of each belligerent were closed to the citizens of the other, and its territory was to the other enemy's country. When, therefore, our armies marched into the country which acknowledged the authority of the Confederate government, that is, into the enemy's country, their officers and soldiers were not subject to its laws, nor amenable to its tribunals for their acts. They were subject only to their own government, and only by its laws, administered by its authority, could they be called to account. As was observed in the recent case of *Coleman v. Tennessee*, 97 U. S. 509, 24 L. Ed. 1118, it is well settled that a foreign army, permitted to march through a friendly country, or to be stationed in it by authority of its sovereign or government, is exempt from its civil and criminal jurisdiction. The law was so stated in the celebrated case of *The Exchange*, reported in 7 Cranch, 116, 3 L. Ed. 287. Much more must this exemption prevail where a hostile army invades an enemy's country. There would be something singularly absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country it had invaded. The same reasons for his exemption from criminal prosecution apply to civil proceedings. There would be as much incongruity, and as little likelihood of freedom from the irritations of the war, in civil as in criminal proceedings prosecuted during its continuance. In both instances, from the very nature of war, the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army. It is difficult to reason upon a proposition so manifest; its correctness is evident upon its bare announce-

ment, and no additional force can be given to it by any amount of statement as to the proper conduct of war. It is manifest that if officers or soldiers of the army could be required to leave their posts and troops, upon the summons of every local tribunal, on pain of a judgment by default against them, which at the termination of hostilities could be enforced by suit in their own States, the efficiency of the army as a hostile force would be utterly destroyed. Nor can it make any difference with what denunciatory epithets the complaining party may characterize their conduct. If such epithets could confer jurisdiction, they would always be supplied in every variety of form. An inhabitant of a bombarded city would have little hesitation in declaring the bombardment unnecessary and cruel. Would it be pretended that he could call the commanding general, who ordered it, before a local tribunal to show its necessity or be mulcted in damages? The owner of supplies seized or property destroyed would have no difficulty, as human nature is constituted, in believing and affirming that the seizure and destruction were wanton and needless. All this is too plain for discussion, and will be readily admitted.

Nor is the position of the invading belligerent affected, or his relation to the local tribunals changed, by his temporary occupation and domination of any portion of the enemy's country. As a necessary consequence of such occupation and domination, the political relations of its people to their former government are, for the time, severed. But for their protection and benefit, and the protection and benefit of others not in the military service, or, in other words, in order that the ordinary pursuits and business of society may not be unnecessarily deranged, the municipal laws—that is, such as affect private rights of persons and property, and provide for the punishment of crime—are generally allowed to continue in force, and to be administered by the ordinary tribunals as they were administered before the occupation. They are considered as continuing, unless suspended or superseded by the occupying belligerent. But their continued enforcement is not for the protection or control of the army, or its officers or soldiers. These remain subject to the laws of war, and are responsible for their conduct only to their own government, and the tribunals by which those laws are administered. If guilty of wanton cruelty to persons, or of unnecessary spoliation of property, or of other acts not authorized by the laws of war, they may be tried and punished by the military tribunals. They are amenable to no other tribunal, except that of public opinion, which, it is to be hoped, will always brand with infamy all who authorize or sanction acts of cruelty and oppression.

If, now, we apply the views thus expressed to the case at bar, there will be no difficulty in disposing of it. The condition of New Orleans and of the district connected with it, at the time of the seizure of the property of the plaintiff and the entry of the judgment against Dow, was not that of a country restored to its nominal relations to the Union, by the fact that they had been captured by our forces, and were held in subjection. A feeling of intense hostility against the government of the Union prevailed, as before, with the people,

which was ready to break out into insurrection upon the appearance of the enemy in force, or upon the withdrawal of our troops. The country was under martial law; and its armed occupation gave no jurisdiction to the civil tribunals over the officers and soldiers of the occupying army. They were not to be harassed and mulcted at the complaint of any person aggrieved by their action. The jurisdiction which the District Court was authorized to exercise over civil causes between parties, by the proclamation of General Butler, did not extend to cases against them. The third special plea alleges that the court was deprived by the general government of all jurisdiction except such as was conferred by the commanding general, and that no jurisdiction over persons in the military service for acts performed in the line of their duty was ever thus conferred upon it. It was not for their control in any way, or the settlement of complaints against them, that the court was allowed to continue in existence. It was, as already stated, for the protection and benefit of the inhabitants of the conquered country and others there not engaged in the military service.

If private property there was taken by an officer or a soldier of the occupying army, acting in his military character, when, by the laws of war, or the proclamation of the commanding general, it should have been exempt from seizure, the owner could have complained to that commander, who might have ordered restitution, or sent the offending party before a military tribunal, as circumstances might have required, or he could have had recourse to the government for redress. But there could be no doubt of the right of the army to appropriate any property there, although belonging to private individuals, which was necessary for its support or convenient for its use. This was a belligerent right, which was not extinguished by the occupation of the country, although the necessity for its exercise was thereby lessened. However exempt from seizure on other grounds private property there may have been, it was always subject to be appropriated, when required by the necessities or convenience of the army, though the owner of property taken in such case may have had a just claim against the government for indemnity.

The case of *Elphinstone v. Bedreechund* is an authority, if any were needed, that a municipal court has no jurisdiction to adjudge upon the validity of a hostile seizure of property; that is, a seizure made in the exercise of a belligerent right. There it appeared that a city of India had been captured by the British forces, and a provisional government established, which subsequently held undisturbed possession of the place. Several months after its occupation, the members of the provisional government seized the private property of a native, under the belief that it was public property intrusted to his care by the hostile sovereign. The native had been refused the benefit of the articles of capitulation of a fortress, of which he was governor, but had been permitted to reside under military surveillance in his own house in the city, where the seizure was made. At the time, there were no hostilities in the immediate neighborhood, and the civil courts were sitting for the administration of justice; but the war was not at an end throughout the country, and there was

a feeling of great hostility on the part of the people of the place, which was only prevented from breaking out into insurrection by the presence of an armed force. In these respects the position of the place was similar to that of New Orleans and the adjacent country under the command of General Butler. The property seized consisted of gold coin, jewels, and shawls; and the owner having died, an action for their value was brought by his executor against the members of the provisional government who ordered the seizure, and judgment was rendered against them in the Supreme Court of Bombay. That court appeared to be controlled in its decision by the fact that for some months before the seizure the city had been in the undisturbed possession of the provisional government, and that civil courts, under its authority, were sitting there for the administration of justice. But on appeal to the Privy Council the judgment was reversed. "We think," said Lord Tenterden, speaking for the Council, "the proper character of the transaction was that of a hostile seizure made, if not flagrante, yet nondum cessante bello, regard being had both to the time, the place, and the person; and, consequently, that the Municipal Court had no jurisdiction to adjudge upon the subject, but that, if any thing was done amiss, recourse could only be had to the government for redress." 1 Kn. 361. Here, the special pleas allege that the articles of property taken by the military detachment under General Dow were seized by his order, as necessary and convenient supplies for the occupying army. It was a hostile seizure, as much so as that of the property in the case cited, being made, like that one, in the exercise of a belligerent right, upon the propriety or necessity of which the Municipal Court had no authority to adjudge.

This doctrine of non-liability to the tribunals of the invaded country for acts of warfare is as applicable to members of the Confederate army, when in Pennsylvania, as to members of the National army when in the insurgent States. The officers or soldiers of neither army could be called to account civilly or criminally in those tribunals for such acts, whether those acts resulted in the destruction of property or the destruction of life; nor could they be required by those tribunals to explain or justify their conduct upon any averment of the injured party that the acts complained of were unauthorized by the necessities of war. It follows that, in our judgment, the District Court of New Orleans was without jurisdiction to render the judgment in question, and the special pleas in this case constituted a perfect answer to the declaration. See *Coleman v. Tennessee*, 97 U. S. 509, 24 L. Ed. 1118; *Ford v. Surget*, 97 U. S. 594, 24 L. Ed. 1018; also *Le Caux v. Eden*, 2 Doug. 594; *Lamar v. Browne*, 92 U. S. 187, 23 L. Ed. 650; and *Coolidge v. Guthrie*, Fed. Cas. No. 3,185, 8 Amer. Law Reg. (N. S.) 22.

We fully agree with the presiding justice of the Circuit Court in the doctrine that the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield. We do not controvert the doctrine

of *Mitchell v. Harmony*, reported in 13 How. 115, 14 L. Ed. 75; on the contrary, we approve it. But it has no application to the case at bar. The trading for which the seizure was there made had been permitted by the Executive Department of our government. The question here is, What is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country; it is not the civil law of the conquering country: it is military law,—the law of war,—and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home, and, in time of peace, is essential to the preservation of liberty.

Our decision upon the questions certified to us is, that the replication is not a good and sufficient reply to the special pleas; and that the Sixth District Court of New Orleans, at the time and place mentioned, had not jurisdiction of the parties and cause of action to render the judgment in question. The judgment of the Circuit Court must, therefore, be reversed, and the cause remanded with directions to that court to enter final judgment for the defendant on the demurrer to the replications; and it is

So ordered.

Mr. Justice SWAYNE dissented from the opinion of the court on the point relating to the jurisdiction of this court, but concurred therewith on the remaining questions involved in the case.

Mr. Justice CLIFFORD and Mr. Justice MILLER dissented.

10. COMMONWEALTH v. SHORTALL.

(Supreme Court of Pennsylvania, 1903. 206 Pa. 165, 55 Atl. 952, 65 L. R. A. 193, 98 Am. St. Rep. 759.)

Petition for writ of habeas corpus on behalf of Arthur Wadsworth against William Shortall, a constable who had him in custody under a warrant of arrest for homicide, issued by a justice of the peace in Schuylkill county.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

MITCHELL, J. A somewhat full statement of the facts will be conducive to the proper understanding of the case.

During the summer of 1902 a strike, beginning with a labor union known as the United Mine Workers of America, spread through nearly the whole of the anthracite coal region in Pennsylvania. As time progressed it was accompanied with increasing disorder and violence on the part of the strikers and their sympathizers, so that threats and intimidation, not only of men, but of their women and children, rioting, bridge burning, stoning and interference with railroad trains, destruction of property, and killing of nonunion workmen, became of frequent occurrence. The communities affected were either in secret sympathy with these acts or lacked the courage to put an end to them. Among

the places where the disorder was greatest was Shenandoah, in Schuylkill county. There the police and the sheriff in attempting to preserve the peace were overpowered and beaten by mobs of strikers and several citizens killed. The sheriff having called upon the governor, the latter first ordered out a portion of the militia, and subsequently, on further call, the entire division of the National Guard, on October 6, 1902, by general order No. 39.

The text of this order, which is important, is as follows: "In certain portions of the counties of Luzerne, Schuylkill, Carbon, Lackawanna, Susquehanna, Northumberland and Columbia, tumult and riot frequently occur and mob law reigns. Men who desire to work have been beaten and driven away and their families threatened. Railroad trains have been delayed and stoned, and tracks torn up. The civil authorities are unable to maintain order and have called upon the Governor and Commander-in-Chief of the National Guard for troops. The situation grows more serious each day. The territory involved is so extensive that the troops now on duty are insufficient to prevent all disorder. The presence of the entire division, National Guard of Pennsylvania, is necessary in these counties to maintain the public peace. The Major General commanding will place the entire division on duty, distributing them in such localities as will render them most effective for preserving the public peace. As tumults, riots, mobs, and disorder usually occur when men attempt to work in and about the coal mines, he will see that all men who desire to work, and their families, have ample protection. He will protect all trains and other property from unlawful interference, will arrest all persons engaging in acts of violence and intimidation, and hold them under guard until their release will not endanger the public peace, and will see that threats, intimidations, assaults, and all acts of violence cease at once. The public peace and good order will be preserved upon all occasions and throughout the several counties, and no interference whatsoever will be permitted with officers and men in the discharge of their duties under this order. The dignity and authority of the state must be maintained, and her power to suppress all lawlessness within her borders be asserted."

Under this order the Eighteenth Regiment, being part of the troops under command of Brigadier General Gobin, was stationed in and near Shenandoah. Several houses occupied by nonunion men had been dynamited and attempts made upon others. On October 8th, therefore, General Gobin issued the following order: "At 5:30 p. m. a detail of one corporal and six men should be put at the house of Barney Bucklavage, No. 1118 West Coal street; this house was dynamited on the night of October 6th and is occupied by a woman and four small children, and for the present I deem it best to guard it; my instructions to the guard have been that they shall keep a sentry at the front door sitting inside the house with the door ajar, and one sentry sitting just outside the rear door under the porch, and if any attempt is made to dynamite them, or they are shot at, or stoned, or any suspicious characters prowl around, particularly in the rear of the house, who fail to halt when directed by the guard, the guard shall shoot, and shoot to kill."

The relator, Arthur Wadsworth, was a private in Company A of the Eighteenth Regiment, in service there, and in the evening of October 8th was posted as sentry in the front yard of the Bucklavage house, just outside the door, with orders to halt all persons prowling around or approaching the house, and if the persons so challenged failed to respond to the challenge after due warning "to shoot, and shoot to kill." About 11:30 o'clock he discovered a man approaching along the side of the road nearest the house, and called, "Halt!" The man continued to advance toward the gate. Wadsworth called again, "Halt!" The man continued to advance. Wadsworth then touched the door, and said, "Corporal of the guard." He then called, "Halt!" and again, "Halt!" The man by this time had opened the gate, and was coming into the yard, when Wadsworth, in accordance with his orders, fired, and the man, whose name was afterwards found to be Durham, fell to the ground dead.

A coroner's inquest was held, and the jury found that "the shooting was hasty and unjustifiable," and recommended that the matter be placed in the hands of the district attorney for investigation. In the meantime, on complaint before a justice of the peace, a warrant had been issued for the arrest of Wadsworth, and after the return of the regiment from service he was arrested at his home in Pittsburg by the respondent, a constable of the borough of Shenandoah. A writ of habeas corpus was allowed by the presiding justice of this court, and, the commonwealth not making any charge higher than manslaughter, the relator was admitted to bail pending the argument of the case.

These are all the material facts, and they are undisputed. The only appearance of question is in the testimony of some of the witnesses at the inquest that the deceased was outside the gate when they saw him after he had fallen. The relator and some others of the guard testified that the deceased had opened the gate and entered, but staggered back several steps after the shot was fired.

The issue of general order No. 39 by the Governor was a declaration of qualified martial law in the affected districts. In so characterizing it we are not unmindful of the eminent authorities who have declared that martial law cannot exist in England or the United States at all, or, at least, according to the more moderate advocates of that view, not in time of peace. Thus in *Ex parte Milligan*, 4 Wall. (71 U. S.) 2, 127, 18 L. Ed. 281, it is said in the opinion of the majority of the court, "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." But, in the dissenting opinion in the same case, Chief Justice Chase convincingly distinguished three classes of military rule, which are thus summarized by Judge Hare in his lectures on American Constitutional Law (page 930): "Military law, then, consists of the rules prescribed legislatively for the government of the land and naval forces, which, operating both in war and peace, and defined by Congress, are an offshoot of the civil or municipal law. Military government is the dominion exercised by a general over a conquered state or province. It is therefore a mere application or extension of the force by which the conquest was effected, to the end of keeping the vanquished in subjection, and, being a right derived from war, is hardly compatible with a state of

peace. Martial law is the right of a general in command of a town or district menaced with a siege or insurrection to take the requisite measures to repel the enemy, and depends for its extent, existence, and operation on the imminence of the peril and the obligation to provide for the general safety. As the offspring of necessity, it transcends the ordinary course of law, and may be exercised alike over friends and enemies, citizens and aliens."

Many other authorities of equal rank hold that martial law exists wherever the military arm of the government is called into service to suppress disorder and restore the public peace. So far as any of the questions in the present case are concerned, the difference is one of terms rather than of substance, and is material chiefly in regard, first, to the jurisdiction of courts martial or military commissions over citizens not in the military or naval service, nor engaged in recognized war; or, secondly, to the responsibility of officers or soldiers giving or acting under military orders, when not in actual war, to be called to account in the civil or criminal courts. With the first of these matters we are not now concerned, and the second will be discussed in its due order.

Order No. 39 was, as said, a declaration of qualified martial law. Qualified, in that it was put in force only as to the preservation of the public peace and order, not for the ascertainment or vindication of private rights, or the other ordinary functions of government. For these the courts and other agencies of the law were still open, and no exigency required interference with their functions. But within its necessary field, and for the accomplishment of its intended purpose, it was martial law, with all its powers. The government has and must have this power or perish. And it must be real power, sufficient and effective for its ends, the enforcement of law, the peace and security of the community as to life and property.

It is not unfrequently said that the community must be either in a state of peace or of war, as there is no intermediate state. But from the point of view now under consideration this is an error. There may be peace for all the ordinary purposes of life, and yet a state of disorder, violence, and danger in special directions, which, though not technically war, has in its limited field the same effect, and, if important enough to call for martial law for suppression, is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war. The condition in facts exists, and the law must recognize it, no matter how opinions may differ as to what it should be most correctly called. When the civil authority, though in existence and operation for some purposes, is yet unable to preserve the public order and resorts to military aid, this necessarily means the supremacy of actual force, the demonstration of the strong hand usually held in reserve and operating only by its moral influence, but now brought into active exercise, just as the ordinary criminal tendency in the community is held in check by the knowledge and fear of the law, but the overt lawbreaker must be taken into actual custody.

When the mayor or burgess of a municipality finds himself unable to preserve the public order and security, and calls upon the sheriff with the posse comitatus, the latter becomes the responsible officer,

and therefore the higher authority. So if, in turn, the sheriff finds his power inadequate, he calls upon the larger power of the state to aid with the military. The sheriff may retain the command, for he is the highest executive officer of the county, and if he does so ordinarily the military must act in subordination to him. But if the situation goes beyond county control, and requires the full power of the state, the Governor intervenes as the supreme executive, and he or his military representative becomes the superior and commanding officer. So, too, if the sheriff relinquishes the command to the military, the latter has all the sheriff's authority, added to his own powers as to military methods.

The resort to the military arm of the government, therefore, means that the ordinary civil officers to preserve order are subordinated, and the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander. To call out the military, and then have them stand quiet and helpless, while mob law overrides the civil authorities, would be to make the government contemptible, and destroy the purpose of its existence.

The effect of martial law, therefore, is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned, there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection. What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful.

"Whatever force is necessary for self-defense is also lawful. This law, applied nationally, is the martial law, which is an offshoot of the common law, and, although ordinarily dormant in peace, may be called forth by insurrection or invasion. War has exigencies that cannot readily be enumerated or described, which may render it necessary for a commanding officer to subject loyal citizens, or persons who though believed to be disloyal have not acted overtly against the government, to deprivations that would under ordinary circumstances be illegal; and he must then depend for his justification, not on the laws of war, but on the necessity which, as has been here seen, may warrant the taking of life, and will therefore excuse any minor deprivation." Hare, *Am. Constitutional Law*, lect. xlii, p. 924.

"When a riot assumes such proportions that it cannot be quelled by ordinary means, and threatens irreparable injury to life or property, the sheriff may call forth the posse comitatus and exercise an authority as their chief which can hardly be distinguished from that of a general engaged in repelling a foreign enemy or subduing a revolt. Arms may be used as in battle to bear down resistance, and if loss of life ensues the circumstances will be a justification. The measure does not, however, cease to be civil, or fall beyond the rules which apply when a house is entered in the night by burglars, or a traveler shoots a highwayman who demands his money. Nor will it change its character because the military are called in and the sheriff delegates his authority to the commanding officer. As Lord Mansfield showed in the debate on the Lord George Gordon riots in 1780, soldiers are subject to the

duties and liabilities of citizens, although they wear a uniform, and may, like other individuals, act as special constables or of their own motion for the suppression of a mob, and if the staff does not suffice employ the sword. The intervention of the military does not introduce martial law in the sense in which the term is understood under despotic governments, and even by some distinguished jurists, because, agreeably to the same great magistrate and the settled practice in England and the United States, they are liable to be tried and punished for any excess or abuse of power, not by the martial code, but under the common and statute law." Hare, *Am. Const. Law*, lect. xli, p. 906.

This last quotation illustrates and explains the difference in the application of the term "martial law," which has given so much apparent trouble to some of the text-writers. There is no real difference in the commander's powers in a public war and in domestic insurrection. In both he has whatever powers may be needed for the accomplishment of the end, but his use of them is followed by different consequences. In war he is answerable only to his military superiors, but for acts done in domestic territory, even in the suppression of public disorder, he is accountable, after the exigency has passed, to the laws of the land, both by prosecution in the criminal courts, and by civil action at the instance of parties aggrieved. On this all the authorities agree, and the result flows from the view that martial law in this sense is merely an extension of the police power of the state, and therefore, as expressed by Judge Hare in the quotation *supra*, an "offshoot of the common law, which though ordinarily dormant in peace may be called forth by insurrection or invasion." See *Respublica v. Sparhawk*, 1 Dall. 357, 1 L. Ed. 174; *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75; *Ford v. Surget*, 97 U. S. 594, 24 L. Ed. 1018; and English cases cited in 2 Hare on *Const. Law*, c. xli.

In determining the responsibility for such acts, the courts proceed upon the principle of the common law as applied in issues of false imprisonment, self-defense, etc., that the acts must be judged by the appearance of things at the time. "It is not less clear that although the justification must be based on necessity, and cannot stand on any other ground, it will be enough if the circumstances induce and justify the belief that an imminent peril exists, and cannot be averted without transcending the usual rules of conduct. For when the exigency does not admit of delay, and there is a reasonable and probable cause for believing that a particular method is the only one that can avert the danger, it will be morally necessary, even if the event shows that a different and less extreme course might have been pursued with safety." Hare, *Const. Law*, p. 917.

"It is the emergency that gives the right, and the emergency must be shown before the taking can be justified. In deciding upon this necessity, the state of the facts as they appear to the officer at the time he acted will govern the decision, for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing or the necessity urgent, he is justified in acting upon it, and the discovery afterwards that it was false or erroneous will not make him a tres-

passer." Taney, C. J., *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75.

And, while the military are in active service for the suppression of disorder and violence, their rights and obligations as soldiers must be judged by the standard of actual war. No other standard is possible, for the first and overruling duty is to repress disorder, whatever the cost, and all means which are necessary to that end are lawful. The situation of troops in a riotous and insurrectionary district approximates that of troops in an enemy's country, and in proportion to the extent and violence, of the overt acts of hostility shown is the degree of severity justified in the means of repression. The requirements of the situation in either case, therefore, shift with the circumstances, and the same standard of justification must apply to both. The only difference is the one already adverted to, the liability to subsequent investigation in the courts of the land after the restoration of order.

Coming now to the position of the relator in regard to responsibility, we find the law well settled. "A subordinate stands, as regards the application of these principles, in a different position from the superior whom he obeys, and may be absolved from liability for executing an order which it was criminal to give. The question is, as we have seen, had the accused reasonable cause for believing in the necessity of the act which is impugned, and in determining this point a soldier or member of the posse comitatus may obviously take the orders of the person in command into view as proceeding from one who is better able to judge and well informed; and, if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong with the responsibility incident to disobedience, unless the case is so plain as not to admit of a reasonable doubt. A soldier consequently runs little risk in obeying any order which a man of common sense so placed would regard as warranted by the circumstances." Hare, *Const. Law*, p. 920.

The cases in this country have usually arisen in the army and been determined in the United States courts. But by the articles of war (article 59), under the acts of Congress, officers or soldiers charged with offenses punishable by the laws of the land are required (except in time of war) to be delivered over to the civil (i. e., in distinction from military) authorities, and the courts proceed upon the principles of the common (and statute) law. *U. S. v. Clark* (C. C.) 31 Fed. 711. The decisions, therefore, are precedents applicable here.

A leading case is *U. S. v. Clark* (C. C.) 31 Fed. 710. A soldier on the military reservation at Ft. Wayne had been convicted by court martial, and when brought out of the guardhouse with other prisoners at "retreat" broke from the ranks, and was in the act of escaping, when Clark, who was the sergeant of the guard, fired and killed him. Clark was charged with homicide, and brought before the United States District Judge, sitting as a committing magistrate. Judge Brown, now of the Supreme Court of the United States, delivered an elaborate and well-considered opinion, which has ever since been quoted as authoritative. In it he said: "The case reduces itself to the naked legal proposition whether the prisoner is excused in law in killing the de-

ceased." Then, after referring to the common-law principle that an officer having custody of a prisoner charged with felony may take his life if it becomes absolutely necessary to do so to prevent his escape, and pointing out the peculiarities of the military code, which practically abolish the distinction between felonies and misdemeanors, he continued: "I have no doubt the same principle would apply to the acts of a subordinate officer, performed in compliance with his supposed duty as a soldier; and unless the act were manifestly beyond the scope of his authority, or were such that a man of ordinary sense and understanding would know that it was illegal, that it would be a protection to him, if he acted in good faith and without malice."

In *McCall v. McDowell*, 1 Abb. (U. S.) 212, Fed. Cas. No. 8,673, where an action was brought by plaintiff against Gen. McDowell and Capt. Douglas for false imprisonment under a general order of the former for the arrest of persons publicly exulting over the assassination of President Lincoln, the court said: "Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law will excuse a military subordinate, when acting in obedience to the order of his commander; otherwise he is placed in a dangerous dilemma of being liable to damages to third persons for obedience to the order, or for the loss of his commission and disgrace for disobedience thereto. * * * Between an order plainly legal and one palpably otherwise there is a wide middle ground, where the ultimate legality and propriety of orders depend or may depend upon circumstances and conditions, of which it cannot be expected that the inferior is informed or advised. In such cases justice to the subordinate demands, and the necessities and efficiency of the public service require, that the order of the superior should protect the inferior, leaving the responsibility to rest where it properly belongs, upon the officer who gave the command." The court, sitting without a jury, accordingly gave judgment for Capt. Douglas, though finding damages against Gen. McDowell.

In *U. S. v. Carr*, 1 Woods, 480, Fed. Cas. No. 14,732, which was a case of the shooting of a soldier in Fort Pulaski by the prisoner, who was sergeant of the guard, Woods, J., afterwards of the Supreme Court of the United States, charged the jury: "Place yourselves in the position of the prisoner at the time of the homicide. Inquire whether at the moment he fired his piece at the deceased, with his surroundings at the time, he had reasonable ground to believe, and did believe, that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny then and there existing, or of a disorder which threatened to ripen into mutiny. If he had reasonable ground so to believe, then the killing was not unlawful. But if, on the other hand, the mutinous conduct of the soldiers, if there was any such, had ceased, and it so appeared to the prisoner, or if he could reasonably have suppressed the disorder without the resort to such violent means as the taking of the life of the deceased, and it would so have appeared to a reasonable man under like circumstances, then the killing was unlawful. But it must be understood that the law will not require an officer charged with the order and discipline of a

camp or fort to weigh with scrupulous nicety the amount of force necessary to suppress disorder. The exercise of a reasonable discretion is all that is required."

In *Riggs v. State*, 3 Cold. (Tenn.) 85, 91 Am. Dec. 272, the Supreme Court of Tennessee held to be correct an instruction to the jury that "any order given by an officer to his private which does not expressly and clearly show on its face, or in the body thereof, its own illegality, the soldier would be bound to obey, and such order would be a protection to him."

These are the principal American cases, and they are in entire accord with the long line of established authorities in England.

Applying these principles to the act of the relator, it is clear that he was not guilty of any crime. The situation, as already shown, was one of martial law, in which the commanding general was authorized to use as forcible military means for the repression of violence as his judgment dictated to be necessary. The house had been dynamited at night and threatened again. With an agent so destructive, in hands so lawless, the duty of precaution was correspondingly great. There was no ground, therefore, for doubt as to the legality of the order to shoot. The relator was a private soldier, and his first duty was obedience. His orders were clear and specific, and the evidence does not show that he went beyond them in his action. There was no malice, for it appears affirmatively that he did not know the deceased, and acted only on his orders when the situation appeared to call for action under them. The unfortunate man who was killed was not shown to have been one of the mob gathered in the vicinity, though why he should have turned into the gate is not known. The occurrence, deplorable as it was, was an illustration of the dangers of the lawless condition of the community, or of the minority who were allowed to control it, and must be classed with the numerous instances in riots and mobs where mere spectators and even distant noncombatants get hurt without apparent fault of their own.

Whenever a homicide occurs, it is not only proper, but obligatory, that an official inquiry should be made by the legal authorities. Such an inquiry was had here at the coroner's inquest, and if there were any doubt about the facts we should remand the relator to the custody of the constable under his warrant, for a further hearing before the justice of the peace. But there was no conflict in the evidence before the coroner, and the commonwealth's officer makes no claim here that anything further can be shown. The facts, therefore, are not in dispute, and the question of relator's liability depends on whether he had reasonable cause to believe in the necessity of action under his orders. As said by Judge Hare, citing Lord Mansfield, in *Mostyn v. Fabrigas*, 1 Cowper, 161: "The question of probable cause in this as in most other instances is one of law for the court. The facts are for the jury; but it is for the judges to say whether, if found, they amount to probable cause." Hare's Const. Law, 919.

In *U. S. v. Clark* (C. C.) 31 Fed. 710, already cited, Mr. Justice Brown said: "It may be said that it is a question for the jury in each case whether the prisoner was justified by the circumstances in making use of his musket, and if this were a jury trial I should submit that

question to them. * * * But as I would, acting in (that) capacity, set aside a conviction if a verdict of guilty were rendered, I shall assume the responsibility of directing his discharge."

This court, either sitting as a committing magistrate or by virtue of its supervisory jurisdiction over the proceedings of all subordinate tribunals (*Gosline v. Place*, 32 Pa. 520), has the authority and the duty, on habeas corpus in favor of a prisoner held on a criminal charge, to see that at least a prima facie case of guilt is supported by the evidence against him. In the relator's case the facts presented by the evidence are undisputed, and on them the law is clear and settled. If the case was before a jury, we should be bound to direct a verdict of not guilty, and to set aside a contrary verdict if rendered. It is therefore our duty now to say that there is no legal ground for subjecting him to trial, and he is accordingly discharged.

The relator, Arthur Wadsworth, is discharged from further custody under the warrant held by respondent.

11. CLEVELAND v. HARRIES.

(Court of Appeals of District of Columbia, 1908. 32 App. D. C. 300.)

The Court in the opinion stated the facts as follows:

This is an appeal from a judgment rendered in an action brought by appellant, William G. Cleveland, plaintiff below, as administrator of the estate of Melvin L. Cleveland, deceased, for damages sustained by the drowning of plaintiff's intestate in the Potomac river. The action was brought against the appellee, George H. Harries, brigadier general, commanding the National Guard of the District of Columbia, William E. Bloe, navigating officer, and Frank S. Durston, ensign, respectively, of the Naval Battalion of the District National Guard. The deceased was an enlisted man in the Naval Battalion, and the accident occurred while he was on duty as a member of the crew on a vessel on the Potomac river. * * *

It is alleged in the declaration filed below that the defendants Bloe and Durston were recommended by appellee for appointment. * * * It is then alleged that appellee ordered the U. S. S. Oneida, a steam yacht loaned by the Navy Department of the United States to the Naval Battalion of the District of Columbia, * * * to be taken on a cruise down the Potomac river; that he, knowing that defendants Bloe and Durston were not competent to take charge of said vessel, ordered and directed Bloe to act in the capacity of master or commander of the vessel and Durston to act in the capacity of first officer. It is further alleged "that the defendant Harries, purely for his own personal gratification and pleasure, personally ordered, directed, and commanded to be taken or towed along with the said U. S. S. Oneida, on the cruise aforesaid, at the time aforesaid, a small speed launch, the property of the Naval Battalion of the National Guard of the District of Columbia." It is then charged that it was the duty of appellee to see that the launch was sufficiently staunch and so constructed and so attached as to be safely towed behind the said vessel.

The declaration then alleges at considerable length, and in great detail, that, owing to the defective manner in which the launch was attached to the vessel and the careless and negligent manner in which the vessel was handled, the accident here in question resulted. The deceased, it is alleged, had been ordered by Bloe and Durston to go on board the launch for the purpose of steering it, and was so engaged, in obedience to orders, when the accident happened. In one count of the declaration, appellee is charged with taking the vessel on a practice cruise down the Potomac river, and, in another count, with having ordered the trip for his own gratification and pleasure. In the court below, appellee and Durston demurred to the declaration, and the court sustained the demurrer as to appellee and overruled it as to Durston. Plaintiff elected to stand upon his declaration, and judgment was entered accordingly. The case comes here as to appellee Harries alone. * * *

Mr. Justice VAN ORSDEL delivered the opinion of the Court.

It is sought to attach liability to appellee on the ground that he was negligent in placing Bloe and Durston in charge of the vessel. He is charged with knowledge of their alleged incompetency to properly manage the vessel. * * * It does not appear from the record that any of the things charged as directly causing the accident were done by the order of appellee, or even with his knowledge. The specific charge in the declaration * * * is one of negligence on the part of Bloe and Durston. The accident was caused by failing to release the launch or stop the boat when it began to yaw and rock. This charges negligence, not against appellee, but the other defendants. The failure to connect appellee with this act of alleged negligence, either by his presence at the time, or by an order to proceed in this negligent and reckless manner, or with knowledge and approval of a custom on the part of his subordinate officers to so manage the boat in the manner in which it was being run at the time of the accident, we think, is sufficient to relieve him of any liability. * * *

This narrows the question down to whether or not appellee was actionably negligent in appointing Bloe and Durston to the command of the vessel. Much greater latitude is allowed an officer of the government in the performance of official duty than would be accorded a private individual. He cannot be held liable for an honest mistake in judgment, no matter how fatal the mistake may prove. The law relating to the liability of officers is well stated in Thompson on Negligence (2d Ed.) vol. 1, sec. 588: "Those officers whose duties are of a public or governmental nature are not in general liable for the wrongs of those through whose agency they are obliged to act. Such agents are deemed agents of the public or of the government, and not agents of the superior officer whose orders they receive and obey. This is obviously the rule with regard to military officers, and probably the books disclose no instance of an attempt to make a military commander responsible for a wrong of his subordinate, unless such wrong was directly traceable to some wrong of his own. Neither is the captain of a war vessel answerable for the damage done by her in running down another vessel, if the mischief

happened during the watch of his lieutenant who was on deck and had actual charge of the navigating of the vessel at the time, the captain not being on deck and it not being his duty to be there." (Citing *Nicholson v. Mounsey*, 15 East, 384.)

We think the mere selection of Bloe and Durston to command the vessel on this cruise, under the allegations of the declaration, is not sufficient to attach any liability to appellee. The appointment of these officers to the command is the last point at which the declaration connects appellee, either directly or indirectly, with the accident. It fails to charge him with having given any directions whatever as to the manner in which the vessel should be run, or the manner in which the launch should be towed. He was not present when any of the events occurred which led up to the accident. The acts charged upon which it is sought to attach liability are too remote and disconnected from the acts directly alleged as causing the accident to constitute the proximate cause.

There is no theory upon which, under this declaration, appellee can be held liable. The demurrer was therefore properly sustained. The judgment is affirmed, with costs, and it is so ordered.

Affirmed.

12. FRANKS v. SMITH.

(Court of Appeals of Kentucky, 1911. 142 Ky. 232, 134 S. W. 484, L. R. A. 1915A, 1141, Ann. Cas. 1912D, 319.)

Appeal from Circuit Court, Caldwell County.

Action by R. Sidney Smith against L. C. Franks and others. From a judgment for plaintiff against Franks alone, the latter appeals.

CARROLL, J. The questions presented by this record relate to the power of the Governor to order into active service the militia of the state, and the civil rights and liabilities of militiamen while so engaged, as well as the subordination of the military to the civil authorities in the territory into which they are directed to go. These important questions come up in an action to recover damages for false arrest brought by the appellee Smith a private citizen of Caldwell county, Ky., against the appellant, Franks, McFarland, Cook, Kennedy, and Gans, members of the state militia. During the trial, the action against Kennedy and Cook was dismissed without prejudice by the appellee, and the court peremptorily instructed the jury to return a verdict in favor of McFarland and Gans. After the action was thus disposed of as to these parties, it proceeded against the appellant Franks and the jury assessed the damages against him in the sum of \$1,000. From a judgment upon this verdict Franks appeals, and from the order of the trial court directing a verdict in favor of McFarland and Gans the appellee, Smith, prepared, but did not prosecute, an appeal. At the time, and before the arrest complained of, Gans was captain of Company C, Third Infantry, Kentucky State Guards, and Franks was a sergeant, and Cook, McFarland, and Kennedy were privates in the same company. In making the arrest of Smith, they were acting under the orders of superior officers in the military service, and independent of the

civil authorities of Caldwell county. They did not report to or receive any directions from the sheriff or jailer of Caldwell county, or the mayor or marshal of the city of Princeton, or any other civil officer in the city of Princeton or the county of Caldwell, in which county they made the arrest complained of.

The separate answers of Franks, McFarland, Cook, Kennedy, and Gans, which were substantially the same, admitted the arrest and detention of Smith by them, and in justification of their acts they set up that they were at the time regularly enlisted and duly qualified and acting members of Company C, Third Regiment, Infantry, of the Kentucky State Guards, and members of a detachment of said regiment stationed at Princeton, in Caldwell county, Ky.; that Capt. Gans was under the command of E. B. Bassett, the duly appointed, qualified and acting major of said regiment, and Bassett, as major, had general command of the militia then in active service in Western Kentucky under orders from Augustus E. Willson, Governor of the commonwealth and commander in chief of the militia of the state; that on the afternoon of the 26th of November, 1908, Capt. Gans received information from Maj. Bassett that a movement or raid of armed men known as "night riders" was expected to be made that night in the neighborhood of Hopson and Wallonia, in Caldwell county, and was ordered by him to detail a squad of men from his detachment into said neighborhood to prevent if possible any trouble resulting from such movement or raid; that pursuant to and in obedience to said orders Gans detailed Franks, McFarland, Cook, and Kennedy on such described duty, directing them that if during any unusual hour of the night they encountered men traveling the highways in numbers more than two, to halt them, receive their explanation for so traveling at such hours, and, if deemed necessary, to search them, and if they were found carrying concealed weapons to arrest and bring them into camp at Princeton, to be thereafter turned over to the civil authorities of the county; that these orders were given by Gans, and obeyed by Franks, McFarland, Cook, and Kennedy in the performance of their duty as members of the state militia, and in obedience to orders received from superior officers; that on November 27th, about midnight, Franks, McFarland, Cook, and Kennedy, who were stationed on one of the public highways of Caldwell county, encountered the appellee, Smith, and five other men traveling on the highway, and after halting and searching them found in the buggy of Smith and one other of the party pistols, and in pursuance of their orders took them into camp at Princeton, permitting the other four travelers to go on their way; that they had no ill will or feeling against Smith, nor any real or fancied cause for having such feeling; nor did they mistreat or cause him to be mistreated except by arresting and delivering him to Capt. Gans in pursuance to orders.

With respect to the evidence, it only seems necessary to say that Franks, Cook, Kennedy, and McFarland, acting under the orders of their captain, arrested Smith some time after 10 o'clock at night as he was traveling on a public highway in company with five other persons in buggies, and that finding in the buggy in which he was riding a pistol owned by him, he was arrested and carried to Princeton, the headquarters of Capt. Gans, and there kept in custody by Gans until

the next morning when he was turned over to the civil authorities upon the unfounded charge of carrying concealed about or upon his person a deadly weapon, as this weapon was found not on his person, but in the buggy. There is no evidence that Smith had theretofore or was then about to commit a public offense of any kind. In company with his neighbors who had attended a lodge of which they were members, he was on his way home at the time of his arrest. There is some evidence that he was treated in an abusive and insulting manner by the soldiers who arrested him, and that he suffered on account of exposure to the cold of the night. But, for the purposes of this case, we will not go into the question of any misconduct on the part of the arresting officers, preferring to treat the case, as the facts justify us in doing, as if Smith while peaceably and rightfully traveling on the public highway was arrested and detained without authority, unless warrant for his arrest and detention sufficient to justify the militiamen can be found in the orders that were given to them by their superior officer. We will also assume that the arrest and detention of Smith was made in strict obedience to orders received by Franks and his comrades from their superior officer, Capt. Gans; and that Capt. Gans received the orders that he gave to Franks and the privates from his superior officer, Maj. Bassett; that Maj. Bassett was acting in obedience to and under the authority of the Adjutant General of the state; and that the Adjutant General was acting under orders from the Governor of the state. In short, we will take it for granted that the militiamen were regularly ordered into active service by the Governor of the state, and that everything the officers and privates did was strictly in obedience to orders issued by their superior officers and received by them in accordance with the laws and regulations governing the state militia.

Treating the facts in this way, it is the contention of counsel for Franks that a soldier in active service is not amenable to the civil authorities for his reasonable acts performed in strict obedience to the orders of his superiors, and that in an action against him for false arrest or for false imprisonment or detention, he can depend upon his military orders for protection, and if they were reasonable and he did not exceed the authority conferred by them, they are a complete justification for his conduct; while counsel for the appellee, Smith, insists: First. That the Governor has no authority in law to order into active service the state militia, unless requested so to do by the civil authorities of the county, city, or town into which they are directed to go and operate, and so everything they did was in violation of law. Second. That a soldier although regularly called into active service and acting within the strict line of his military orders, has no power to make an arrest or to do any act that a private citizen might not do, and therefore he can make no defense that will justify his acts except such a defense as any private citizen might make if sued upon a similar cause of action.

Considered from the standpoint of counsel, two principal questions naturally suggest themselves: First. Has the Governor in the exercise of the authority conferred upon him by law and without being requested so to do by a civil officer of any city, town, or county, the power to call out and order into active service the state militia, and di-

rect their movements and operations without placing them under the orders or control of the civil authorities or any of them in the territory into which they are sent? Second. Are members of the state militia when acting in obedience to orders given to them by a superior officer liable in a civil action for making an arrest or doing any other reasonable act they are commanded by a superior officer to do?

Section 69 of the Constitution declares: "The supreme executive power of the commonwealth shall be vested in a chief magistrate, who shall be styled the Governor of the Commonwealth of Kentucky."

Section 75 provides that: "He shall be commander-in-chief of the army and navy of this commonwealth, and of the militia thereof, except when they shall be called into the service of the United States; but he shall not command personally in the field, unless advised so to do by a resolution of the General Assembly."

And section 81 commands that: "He shall take care that the laws be faithfully executed."

Section 2672, Ky. St. (Russell's St. § 4695), in the chapter relating to the state militia, reads: "It shall be the duty of the Governor, whenever he may deem it necessary for the safety or welfare of the commonwealth, or when any actual or threatened invasion, insurrection, domestic violence or other danger to the public interest makes it necessary to employ military force in aid of the civil power of the government for the enforcement of the law, or to preserve the peace and the security of the rights and lives or property of the citizens, to order into active service so much of the state guard or military force of the commonwealth as he may deem necessary. The state guard can be ordered into active service only by the Governor."

Section 2673 (section 4696) reads: "The military shall be at all times and in all cases in strict subordination to the civil power."

And section 2674 (section 4697): "When in active service the Governor may direct the commanding officer of the military force to report to any one of the following named officers of the district in which the said force is employed—mayor of a city, sheriff, jailer or marshal."

We find from these sections of the Constitution and statute that the Governor is the chief civil officer of the commonwealth, and is charged with the duty of taking care that the laws of the state are faithfully executed; that he has authority to order the militia into active service whenever or wherever he may deem it necessary to secure the safety or welfare of the commonwealth or to preserve the peace or lives or property of citizens of the state; that the militia can only be ordered into active service by him, but that it shall be at all times in strict subordination to the civil authorities. It will be observed that there is no limitation either in the Constitution or statute upon the power vested in the Governor to order into active service the militia of the state or to direct into what locality they shall go or operate. He is made the sole judge of the necessity that may seem to demand the aid and assistance of the military forces of the state in suppressing disorder and restoring obedience to the law. The presumption of course is that he will not exercise this high power unless it becomes necessary to maintain peace and quiet and protect the life or property of the citizen, after the local civil authorities have shown themselves unable to cope with or control

the situation. But to his good judgment and sound discretion the law has left the final decision as to whether the military arm of the state shall be ordered into active service. If he acts wisely and prudently, well and good. If he acts hastily or unwisely or imprudently, there is no power in the courts to control or restrain his acts. Any attempt on the part of the judicial department of the state so to do would be an interference by one department of the government with the power lodged in another department, and a violation of section 27 of the Constitution of the state, providing: "The powers of the government of the commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." And section 28, reading: "No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

The power thus lodged in the Governor is extensive, unrestrained, and subject to abuse. But all power is subject to abuse. If the fact that power might be abused was sufficient to deny the granting of it, there could be no final authority, and everything must be referred back to the people—the source of all power. Of course, a system of government that was denied the authority to take final action would be too weak and inefficient to maintain itself or afford due measure of security and protection to the people who created and established it; and in many instances it would entirely fail to accomplish the purpose of its existence. The power to call out the state militia was vested in the Governor, the chief executive officer of the state, for the wise and wholesome purpose of enabling him to carry into effect the mandate of the Constitution that he must "take care that the laws be faithfully executed." If this power was not lodged in him, then this provision of the Constitution would be an idle and meaningless phrase, because, although charged with the duty of taking care that the laws of the state should be faithfully executed, he would have no authority to enforce the obligation imposed upon him. It is only through and with the aid of the state militia that he can make effective the authority conferred by the Constitution, and it was for this purpose that the Legislature enacted section 2672, Ky. St., before cited. The power conferred by this section is ample to meet every emergency that may present itself, and it gives to the chief executive of the state the fullest authority to call to his assistance in any contingency that may arise a force sufficient to quell disorder and restore peace. Under the sanction of this statute he may act independently of any other civil authority if he desires to do so, or he may act in conjunction with the other civil authorities. He may on his own initiative order out the state militia, or he may wait until requested so to do by the local authorities in the community in which they are needed. He may place the militia at the disposal of the civil authorities, or he may, through military channels, control and direct, within lawful bounds, their movements and operations. Which of these courses he will pursue, he alone is to judge. The Constitution and statute have given him this power, and we could not if we

desired abridge it. *Ela v. Smith*, 5 Gray (Mass.) 121, 66 Am. Dec. 356. For his conduct in ordering out and controlling the movements and operations of the state militia, the Governor is answerable only at the bar of public opinion, unless it be that abuses might warrant impeachment proceedings. It cannot for a moment be entertained that the Governor must delay action until requested by the local authorities. This limitation upon his constitutional duty would in many instances deny him the right to take prompt and decisive action to suppress threatened or actual disorder or violence and enforce obedience to the law. It would interfere with the express authority conferred upon him by the statute, and would in many instances and in many places be disastrous to the peace and welfare of the state. Primarily, the enforcement of the law is with the local civil authorities, but at times they are too weak to control the lawless elements that exist in every society, and at other times they might be in sympathy with the forces who want to take the law into their own hands. But, whatever the reason that may exist for the failure or inability of the local civil authorities to suppress violence and disorder, when it comes to pass that they cannot or will not do it, then it is not only the right but the plain duty of the Governor to act. Ours is a government of law. Under its authority and through its agencies alone wrongs must be redressed and rights protected. Unless this were so, there would be no assurances of peace or quiet for the law-abiding and order-loving who constitute so large a part of our people. The life and the property of the citizen would be insecure, and the lawless, reckless, and violent would be at liberty to exercise at will their disregard of civil authority. In every age of the world and in every state and country, it has been found necessary to the stability and efficiency of government that there should always be at its command a military force to support the civil authorities in times of disorder and riot; and this is so because there has never been and will never be a time in the history of any state or country in which the passions and prejudices of the people, when aroused by some real or fancied wrong, have not prompted men to take into their own hands the redress of genuine or imaginary injuries or the enforcement of what they conceived to be their rights. For the truth of these statements we need not go beyond our own commonwealth. In every Constitution we have had, provision has been made for a military force, and one of the first laws enacted after the establishment of the state had for its purpose the creation of a state militia. The men who placed, and who have kept, these provisions in the organic law as well as the statute knew the temper of our people—what they had done, and what they would do. Indeed the history of the state, from its beginning, is filled with examples of attempts—too many of them successful—to disregard and overthrow the law. When an emergency arises calling for quick and decisive action to protect life or property from violence, and the local civil authorities are unable or perhaps unwilling to afford protection, must the Governor of the state, in disregard of his oath and duty, sit supinely by and witness lawless men burn or destroy the property of the citizen, or kill or drive him from his home or business, while waiting for a call from the local officials that may never come, before ordering out the forces that can

and will restore order, preserve peace, and protect life and property? Or, should he, when confronted with a situation like this, do his duty under the Constitution and law? There can be but one answer to this question. The honor and dignity of the state, its good name at home and abroad, as well as the imperative obligation resting upon every government to maintain peace within its borders and protect the lives and property of its people, demand that he shall act with all the power and force at his disposal to suppress the existing disorder and violence. The supremacy and authority of the law at all times and places must be asserted and maintained at all hazard and at whatever cost. There should not be a moment in the life of any orderly, well-established and republican form of government, like ours, when it has not the means and the ability to give to every citizen that peace, safety, happiness, and protection guaranteed to him by the Constitution. Having this view of the power and duty of the Governor, it must nevertheless be kept in mind that in its exercise he acts in his capacity as a civil officer of the state and not as commander in chief of its army. As the chief civil magistrate of the state, he calls out and must direct in accordance with law the movements and operations of the military forces. "The military shall be at all times and in all cases in strict subordination to the civil power." It is so written in section 22 of the Bill of Rights. We have not, and cannot have, in this state a military force that is not and will not be subordinate to the civil authorities. The military cannot in any state of case take the initiative or assume to do anything independent of the civil authorities. Ours is a government of civil, not military, forces. The militia in active service and in every emergency that arises in such service is subordinate to the civil power. The soldier and the citizen stand alike under the law. Both must obey its commands and be obedient to its mandates.

It follows from these considerations that we are not disposed to agree with the doctrine announced by the Supreme Court of Colorado in *Re Moyer*, 35 Colo. 159, 85 Pac. 190, 12 L. R. A. (N. S.) 979, 117 Am. St. Rep. 189, that in certain emergencies the civil law may be suspended by military orders. Or with the Supreme Court of Pennsylvania in the case of *Commonwealth v. Shortall*, 206 Pa. 165, 55 Atl. 952, 65 L. R. A. 193, 98 Am. St. Rep. 759, where the court, in discussing the relative supremacy of the military and civil authorities in a state of case in which the civil authorities being unable to preserve peace and quiet the military of the state was called out to restore order, said: "Martial law exists whenever the military arm of the government is called into service to suppress disorder and restore the public peace. * * * The resort to the military arm of the government therefore means that the ordinary civil officers to preserve order are subordinated, and the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander. To call out the military and have them stand quiet and helpless, while mob law overrides the civil authorities, would be to make the government contemptible and destroy the purpose of its existence. The effect of martial law therefore is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and

property are concerned, there is no limit but the necessities and exigencies of the situation. And in this respect there is no difference between a public war and domestic insurrection." We are not willing to concede that in any exigency that may arise the military is superior to the civil authorities. We do not apprehend that any conditions could come up that would justify us in so holding. Nor do we believe that the time will ever come when the military forces of the state, acting under and in obedience to the civil laws of the state, will not be able to control under the authority conferred by these laws any situation that may present itself.

We will now endeavor to determine what protection, if any, from civil or criminal liability the soldier has when acting in obedience to the orders of his superior officer. What may he do and yet be safe from suit at the hands of those he has molested in the performance of his military duty? These questions involving as they do the rights and liabilities of the soldier in active service are of great importance, but, with the aid of precedents, we will attempt to lay down a safe yet efficient rule for guidance in cases in which they may arise.

The views concerning these questions presented in argument are widely separated. To restate them: One is that the soldier engaged in active service should be treated as a private citizen, with no more authority than such a citizen to make an arrest, suppress disorder, or prevent crime. The other is that the military forces of the state when called into active service have the right to take such action as in the judgment of the commanding officer may be necessary to control the situation, and the right to act in obedience to orders received through regular military channels, and that when so acting they are not amenable in the civil or criminal courts for executing any reasonable orders received from a commanding officer. In our opinion, each of these positions is open to serious objection. One gives too much power to the military; the other, not enough. One makes the soldier a mere figurehead, the other a machine to do the bidding of his superior. If we are not permitted to look to the common law for the authority of the private citizen to assist in suppressing disorder and restoring peace, and must be confined as insisted by counsel to the statute law of the state, the only authority given in this respect is found in section 37 of the Criminal Code of Practice, providing that "a private citizen may make an arrest when he has reasonable grounds for believing that the person arrested has committed a felony," and in section 38 providing that a magistrate or judge may order a private person to arrest any one committing a public offense in his presence. It must be manifest that if this is the limit of his authority, and that the soldier has no more, it would be a useless thing to call out the militia to aid the civil authorities in suppressing disorder or restoring peace, unless they were placed under the control of the mayor or marshal of the city, or sheriff or jailer of the county, into which they were ordered to go. As the right of a private citizen to arrest is confined, except when acting in the immediate presence of a magistrate or judge, and in obedience to his direction, to cases in which he has reasonable grounds for believing that the person he is about to arrest has committed a felony, there are few instances in which he could efficiently act

to suppress disorder or prevent threatened violence. Irreparable injury may be done to both person and property without the offense being a felony, and it is rare that offenses are committed in the presence of a judge or magistrate. Lawless bands or assemblies of persons might disturb the peace, engage in riotous conduct, threaten the life or property of the citizen, assault and beat him, destroy his property and drive him from his home and business, and yet not commit a felony. A body of rioters might put and keep the people of any community in terror, commit innumerable depredations and infractions of the law, be a continual menace to the peace and quiet of the people, and yet their conduct would not amount to a felonious act. In short, they could commit almost every species of malicious mischief that reckless and evil disposed men could think of, to harm the persons and injure the property of those who had incurred their enmity, and yet the private citizen under the statute quoted, unless to protect himself or his family or his property, would not have the legal right to interfere. In view of these limitations imposed by law upon the right of private citizens to take part in suppressing disorder, it needs no argument to demonstrate that if the power of the soldier is no greater than that of the private citizen the law creating and sustaining the state militia had better be abolished. This limitation would paralyze the military arm of the state and subject it to the contempt of all classes of people. It is no answer to say that this humiliating spectacle might be avoided if the militia were directed to report to and receive orders from one of the civil officers we have mentioned and thereby have authority to take such lawful action as the civil officer might direct. In some instances this might be a satisfactory solution of the difficulty suggested; in others, it would not. As we have pointed out, conditions might be such that the civil officers would be in sympathy with the rioters, or indifferent to the conditions existing, or afraid to assert authority, and it was to provide for a contingency in which conditions like this might appear that the law invested the Governor with the power to control and direct within legal bounds the operation of the militia without subjecting them to the supervision of other civil officers. And for the reasons heretofore stated, we are not disposed to adopt a rule of action that would under any circumstances prevent or interfere with the Governor of the state in his efforts to restore peace and assert and maintain the authority of the law. On the other hand, to say that the state militia acting in obedience to military orders may commit any act that may suggest itself to the commanding officer as being necessary to restore peace and quiet, although such act might be a greater violation of law than was committed by the person it was visited upon, would place the militia above the civil authorities, and give to the soldier power not conferred upon the civil officer charged with the duty of enforcing the law. The command of the officer would take the place of the statute, and there would be no limitation upon his conduct except such as his judgment and discretion might dispose him to adopt. We can find no warrant, either in the Constitution or statute of the state or the history of constitutional government, for investing the military forces of the state with arbitrary power like this. Of course, we have not in mind a state of case in which actual war

between contending armies, or nations, or states exists, as it would be entirely beyond the scope of the questions we are considering to venture an opinion much less lay down any rule of action for the government of military forces operating in territory where a state of war actually prevailed.

It is said, however, that the investment of the officers and privates of the state militia with the power and immunity claimed in argument would not be abused, and that it must be presumed they would act in a reasonable and prudent manner, using no more force than was reasonably necessary to accomplish the purpose intended. But we cannot give our consent to this proposition for two reasons: In the first place, it would be a violation of the law of the state as we understand it; and, in the second place, the history of military affairs is not calculated to inspire the belief that at all times soldiers will act with prudence and discretion. Indeed, the facts of the case before us illustrate the unreasonable extent to which the militia will go in furtherance of what they conceive to be their duty. Capt. Gans testifies that: "My general instructions to patrol at night which covers this case were that when two or more men were found between 10 and 4 o'clock, that they were always covered of course, when they were halted, with our guns, and to question them and find out if they could what they were doing out, and where they were going, and to search them if they thought it necessary, and if they found arms to bring them into camp to be turned over to the civil authorities." This order was given and carried into execution by the arresting officers, although at the time and for weeks preceding there had been no violence or disorder in the neighborhood or community in which the arrests were made. The only excuse or defense made for the arrest of Smith is that Capt. Gans in giving the orders, and Franks and his comrades in executing them, were acting under orders received from superior military officers. And it is earnestly insisted that these orders furnished a complete justification for the arrest and detention of Smith, and the trial court should have so ruled. It is said in argument that it is the duty of a soldier to obey, without inquiry or question, all reasonable orders received from his commanding officer, and that as this was such an order as a person of common sense might believe to be warranted by the surroundings the soldier is not liable to suit for obeying it. If this argument is sound, then it naturally and logically follows that any private citizen may at any time and under any circumstances be deprived of his liberty and left without redress for the injury done him. If soldiers armed with guns have authority to arrest and take into custody in the midst of a peaceful community persons whom they find riding on the public highway after 10 o'clock at night, who are not charged with and have not committed any offense against the law, and who are in an orderly and well-behaved manner returning to their homes, they can also, by the same authority, and without any other reason or cause, take the private citizen from the midst of his family, the farmer from his plow, the blacksmith from his forge, and the merchant from his place of business. In fact, no person at any time or place would be free from military arrest and detention. It may be and doubtless is true that, looking at the matter from a military standpoint, the order

to act as Franks did was not such an unreasonable command as that a soldier of common sense would feel authorized to refuse to obey. But be this as it may, conduct like this is such an intolerable invasion of private rights, and so at war with the principles set forth in the Bill of Rights, that "the people shall be secure in their person, houses, papers, and possessions from unreasonable search and seizure" (section 10), that we cannot consent that all military orders, however reasonable they may appear, will afford protection in the civil or criminal courts of the state. We have in this state an elaborate system of common and statute law, intended to, and that in fact does, meet every requirement of an orderly and well-regulated society. There is no interference with the peace or quiet of the citizen or molestation of his person or property that under these laws may not be punished. All these offenses against law and order have been carefully created and defined, and it cannot be seriously insisted that the mere dictum of a military officer may supersede the lawmaking department of the government, or that a soldier of his own will can convert into offenses against the peace and dignity of the commonwealth acts that the Legislature in its wisdom did not deem proper to so denominate. This condition can only exist when the civil law has been supplanted by the military, and the soldier is greater than the magistrate. As said by the Supreme Court of Illinois in *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 159: "The right of the citizen to his personal liberty, except when restrained of it upon a charge of crime and for the purpose of judicial investigation or under the command of the law pronounced through a judicial tribunal, is one of those elementary facts which lie at the foundation of our political structure. The cardinal object of our Constitution, as it is the end of all good government, is to secure the people in their right to life, liberty, and property. The more certainly to attain this end the framers of our Constitution not only proclaimed certain great principles in the Bill of Rights, but they distributed governmental power into three distinct departments, each of which, while acting in its proper sphere, was designed to be independent of the others. To the legislative department it belongs to declare the causes for which the liberty of the citizen may be taken from him; to the judiciary department, to determine the existence of such causes in any given case; and to the executive, to enforce the sentence of the court. If a citizen can be arrested except upon a charge of violated law, and for the purpose of taking him before some judicial tribunal for investigation, then it is plain that the executive department has usurped the functions of the other two and the whole theory of our government so far as it relates to the protection of private rights is overthrown.

* * * As no charge is made, no judicial investigation had, it is left entirely to the caprice of the government to determine what persons shall be seized. The power to thus arrest being once conceded, every man in the state, from the Governor down to the humblest citizen, would hold his liberty at the mercy of the military officer in command."

If, then, the soldier is not protected, from suit or prosecution by his military orders, the inquiry naturally suggests itself, What can he do to save himself from punishment for refusing to obey the command of his superior officer, from liability in a civil action by the person he has

wronged, or from criminal proceedings on the part of the commonwealth? This embarrassing position in which the soldier finds himself is well treated in the *Law of the Constitution* by Dicey, p. 281, where he says: "A soldier is bound to obey any lawful order which he receives from his military superior. But a soldier cannot any more than any civilian avoid responsibility for breach of the law by pleading that he broke the law in bona fide obedience to orders of the commander in chief. Hence, the position of a soldier may be both in theory and in practice a difficult one. He may, as it has been said, be liable to be shot by a court-martial for disobedience of orders, or to be hanged by a judge and jury if he obeys it. * * * What is, from a legal point of view, the duty of a soldier? The matter is one which has never been absolutely decided. The following answer given by Mr. Justice Stevens is, it may be fairly assumed, as nearly correct a reply as the state of the authorities make it possible to provide: * * * "The only line that presents itself to my mind is that a soldier should be protected by orders for which he might reasonably believe his officer to have good grounds for giving. The inconvenience of being subject to two jurisdictions, the sympathies of which are not unlikely to be opposed to each other, is an inevitable consequence of a double necessity of preserving on the one hand the supremacy of the law, and on the other the discipline of the army.' * * * While, however, a soldier runs no substantial risk of punishment for disobedience to orders which a man of common sense may honestly believe involve any breach of law, he can under no circumstances escape the chance of his military conduct becoming the subject of inquiry before a civil tribunal and cannot avoid liability on the ground of obedience to superior orders for any act which a man of ordinary sense must have known to be a crime." To the same effect is *Medley's Constitutional History*, p. 481.

In Hare's *American Constitutional Law*, vol. 2, c. 41, p. 906, this learned writer lays it down that: "When a riot assumes such proportions that it cannot be quelled by ordinary means, and threatens irreparable injury to life or property * * * arms may be used as in battle to bear down resistance, and if loss of life ensues the circumstances will be a justification. The measure does not however cease to be civil, or fall beyond the rules which apply when a house is entered in the night by burglars, or a traveler shoots a highwayman who demands his money. Nor will it change its character because the military are called in and the sheriff delegates his authority to the commanding officer. As Lord Mansfield showed in the debate on the Lord George Gordon riots, in 1780, soldiers are subject to the duties and liabilities of the citizens, although they wear a uniform and may like other individuals act as special constables or of their own motion for the suppression of a mob, and if the staff does not suffice, employ the sword. The intervention of the military does not introduce martial law in the sense in which the term is understood under despotic governments and even been by some distinguished jurists, because agreeably to the same great magistrate and the settled practice in England and the United States they are liable to be tried and punished for any

excess or abuse of power, not by the martial code, but under the common and statute law."

Running through these authorities, and others that we have examined, will be found the principle that the soldier is amenable to the civil authorities for his acts in violation of law; but that "yet a soldier runs little risk in obeying any order which a man of common sense so placed would regard as warranted by the circumstances. And if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong with the responsibility incident to disobedience unless the case is so plain as not to admit of a reasonable doubt." Hare's Am. Con. Law, vol. 2, c. 41, p. 920; Dicey, Law of the Con., p. 285; *Commonwealth v. Shortall*, 206 Pa. 165, 55 Atl. 952, 65 L. R. A. 193, 98 Am. St. Rep. 759; *Luther v. Borden*, 7 How. 45, 12 L. Ed. 581; *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75; *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281; *McCall v. McDowell*, 1 Abbott (U. S.) 212, Fed. Cas. No. 8,673; *United States v. Clark* (C. C.) 31 Fed. 710; *Riggs v. State*, 3 Cold. (Tenn.) 85, 91 Am. Dec. 272; *Christian Co. Court v. Rankin*, 2 Duv. 502, 87 Am. Dec. 505; *Hogue v. Penn*, 3 Bush, 663, 96 Am. Dec. 274.

With the liability of the soldier under the military law for refusing to obey the orders of his superior officer we are not much concerned in disposing of the matter before us. Whether the military law can punish him or not for disobedience of an order that if executed would involve him in civil or criminal liability, is a question that it is well to postpone answering until it comes up. But, what orders of his superior a soldier may obey and be exempt from civil liability, and what orders his obedience of will subject him to suit, are before us and must be disposed of. Upon this point, after mature consideration, we have reached the conclusion that any military order, whether it be given by the Governor of the state or an officer of the militia or a civil officer of a city or county, that attempts to invest either officer or private with authority in excess of that which may be exercised by peace officers of the state is unreasonable and unlawful; and if it is obeyed, the officer or private giving obedience subjects himself to such punishment and liability as the penal and civil laws of the state might inflict against a private individual guilty of similar transgression of the law or the rights of the citizen. We feel at liberty to thus define the limits within which soldiers may lawfully act, because all the authorities agree that the courts may at the instance of any person who has been aggrieved or on behalf of the commonwealth inquire into their acts and doings and determine whether or not they have been guilty of any conduct that would subject them to liability or punishment. The only difference between our ruling and that obtaining in the authorities cited is that we define more precisely than they do what orders a soldier is justifiable in executing, and hold as a matter of law that these orders are confined to such as a peace officer in the discharge of his duty might execute. In respect to these orders, the powers of the military and local civil officers of the state are identical. What one cannot do, neither can the other; what one may do, so may the other. The soldier has the same measure of protection and is subject to the same liability, whether he is acting under the orders of a military officer, independent

of the local civil authorities, or is acting under immediate direction of these authorities. Neither has the right to give any orders or directions except those that a peace officer of the state might rightfully execute; and if the soldier does only what a peace officer may do, then he is entitled to the immunity afforded peace officers in the performance of their duty. This rule of conduct is of course not free from objection, but upon the whole we think it furnishes a reasonable guide for the militia, and describes with as much accuracy as conditions will permit the lines within which they may act with safety and beyond which they may not go without peril. Its observance will protect the quiet and orderly citizen from disturbance, and arrest and leave the lawbreaker to be dealt with as his conduct deserves.

Let us now see what the military can do surrounded by this limitation upon its power, and whether or not it can be an efficient force in every emergency that may require its assistance. In treating this aspect of the case, we shall not undertake to go into details concerning what a peace officer may or may not lawfully do. Cases presenting this question come up in so many different forms that, excepting some general principles that are applicable to all, each case must be adjudged by the facts it presents, and it would be outside the scope of the matter before us to undertake any discussion of this feature. It has been treated of in numerous opinions of the court. We are chiefly interested in the inquiry whether or not if the power of the militia is confined to the doing of those things that a peace officer may rightfully do, will its operations be so embarrassed that it cannot successfully master any conditions that it may be called on to deal with. Under section 26 of the Criminal Code of Practice sheriffs, constables, coroners, jailers, marshals, and policemen are peace officers; and other officers are so designated by various sections of the statute. Section 36 of the Criminal Code of Practice provides that "a peace officer may make an arrest, without a warrant, when a public offense is committed in his presence or when he has reasonable grounds for believing that the person arrested has committed a felony"; and in other sections of the Criminal Code and statute and under the common law there are provisions further defining the powers and duties of peace officers in cases of riots, routs, unlawful assemblies, or when two or more persons have confederated or banded together for the purpose of intimidating, threatening, alarming, disturbing, or injuring any person or molesting or destroying any property. Under the common law and these various statutes the military acting as peace officers would have the right to arrest any person who had committed a felony, or was committing in their presence an act that constituted a public offense under the statute or at common law, and the right to disperse, control, and suppress riots, routs, unlawful assemblies or bodies of men acting in concert for the purpose of intimidating, threatening, alarming, disturbing, or injuring any person or molesting or destroying property, with all the means and force necessary to accomplish these ends. *Ela v. Smith*, 5 Gray (Mass.) 121, 66 Am. Dec. 356; *Russell on Crimes*, vol. 1, pp. 266-289; *Blackstone's Com.* vol. 4, p. 143. This statement does not of course describe all the conditions under which the military acting as peace officers may make arrests or disperse disorderly or other gatherings. It

is only intended in a general way to illustrate that when the militia is armed with the power and authority of peace officers, under the statute and at common law, there need be no apprehension that they cannot effectively control any situation demanding their presence. The militia of the state are in truth peace officers. The purpose of their existence is to preserve the peace and quiet of the state in its broadest sense, and when this has been done, the life and property of the citizen is secure.

It results from what we have said that the conduct of Franks and his associates in arresting Smith was indefensible. He had not committed any act that would justify a peace officer in arresting or detaining him. Gans and McFarland participated in his detention and so were equally liable with the others, but no appeal is prosecuted against them.

It is said that the verdict against Franks is excessive, but we are not disposed to disturb it on this ground.

Wherefore the judgment is affirmed.

3. GOVERNMENT'S CIVIL LIABILITY FOR CONTRACTS AND TORTS BY MILITARY PERSONS

1. UNITED STATES v. McLEMORE.

(Supreme Court of the United States, 1846. 4 How. 286, 11 L. Ed. 977.)

This was an appeal from the Circuit Court of the United States for the District of Middle Tennessee, sitting as a court of equity.

It is unnecessary to recite all the circumstances which led to the filing of the bill in equity, as it was dismissed for the want of jurisdiction in the Circuit Court. The facts in the case are summarily stated in the opinion of the court.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the decree of the Circuit Court of the United States, for the district of Middle Tennessee.

The bill was filed by McLemore and Cantwell, surviving executor of Robert Searcy, deceased, and surviving executor of George M. Deoderick, deceased, representing that a judgment was obtained by the United States against the executors of Searcy, for the sum of seventeen thousand and twenty-eight dollars and forty-one cents. That various payments had been made on the judgment until the whole or nearly the whole had been paid. That the last execution on the judgment was issued the 10th of January, 1842, for a balance claimed on the judgment of two thousand eight hundred thirty-two dollars and thirty-seven cents. And they state that their payments were made to different persons named, who succeeded each other in the office of District Attorney of the United States for Middle Tennessee; and that by the absence and death of a part of them it is difficult to show the sums paid. That the money was principally collected by the district attorneys on notes handed them for collection, the proceeds of which, when received, were to be applied to the discharge of the judgment. That this arrangement was sanctioned by the treasury depart-

ment. And the prayer of the bill is, that the judgment may be enjoined, &c.

The District Attorney of the United States answered the bill, and the matter of payments was referred to a master, who reported a balance against the United States, after paying the judgment. On this report, the district judge holding the Circuit Court decreed a perpetual injunction, and that the United States should pay the costs.

There was no jurisdiction of this case in the Circuit Court, as the government is not liable to be sued, except with its own consent, given by law. Nor can a decree or judgment be entered against the government for costs.

The Circuit Court, as a court of law, may direct credits to be given on the judgment, and having a right to order satisfaction to be entered on the judgment, consequently may examine the grounds on which such an entry is claimed, and may direct the execution to be stayed until such an investigation shall be made.

The bill is dismissed.

2. UNITED STATES v. ADAMS.

(Supreme Court of the United States, 1868. 7 Wall. 463, 19 L. Ed. 249.)

[Appeal from the Court of Claims.]

The suit was founded on the petition of Adams, claiming a balance against the government on contracts with General Fremont, commanding the Western Military District, for the construction of a certain number of mortar-boats and steam tug-boats, to be used on the Western rivers in the late civil war. The contracts were alleged to have been made on or about the 24th of August, 1861, for the mortar-boats, at a cost of \$8250 each; and on or about the 10th of September following, for the steam tug-boats, at the cost of \$2500 each. The petitioner was also to build cabins and pilot-houses, and construct steering apparatus, and windlasses on the steam-tugs, for which he was to receive the sum of \$1800 in addition for each boat.

After these boats were constructed they were received into the service of the government by the orders of the Secretary of War. This was in the latter part of November, 1861. Previous to this, on the 14th of October, of that year, General Fremont was superseded in his command. And, in consequence of representations of frauds and irregularities committed by General McKinstry, the chief quartermaster of the army of this military district, who had charge of making contracts for supplies and materials necessary for equipping the troops for the expedition contemplated, and who made the contracts, among many others, in question, the Secretary of War, by order of the President, suspended payments upon all contracts within the department until an investigation could be had into the charges thus made.

General McKinstry was afterwards dishonorably dismissed the service for frauds found to have been committed against the government while serving as chief quartermaster of this army. And, after his suspension, on the 25th of October, 1861, the secretary, by a like or-

der, appointed a board of commissioners "to examine and report, to the Secretary of War, upon all unsettled claims against the military department of the West, that had originated prior to the 14th of October, 1861, the day General Fremont had been superseded." This board, composed of three gentlemen of the highest intelligence and character (Messrs. David Davis, Joseph Holt, and Hugh Campbell), met, without delay, at the city of St. Louis, the headquarters of the military department in which the irregularities and frauds in its administration, as charged, had been committed, and entered upon their duties; first giving notice to all persons holding claims against the government to present them for examination, with such proofs and explanations as the claimant might think proper to exhibit. Under this notice, the petitioner, on the 10th of December, 1861, presented his claim. * * *

For these several sums, \$75,959.24 and \$20,196.00, this board gave vouchers to the claimant as due from the government on these contracts, and received from him a receipt in full of all demands, which he signed under protest. When the papers were exchanged does not appear; but not long afterwards, on the 11th of March, 1862, Congress passed the following joint resolution:

"That all sums allowed to be due from the United States to individuals, companies, or corporations, by the commission heretofore appointed by the Secretary of War (for the investigation of military claims against the Department of the West) composed of David Davis, Joseph Holt, and Hugh Campbell, now sitting at St. Louis, Missouri, shall be deemed to be due and payable, and shall be paid by the disbursing officer, either at St. Louis or Washington, in each case upon the presentation of the voucher, with the commissioners' certificate thereon, in any form plainly indicating the allowance of the claim, and to what amount. This resolution shall apply only to claims and contracts for service, labor, or materials, and for subsistence, clothing, transportation, arms, supplies, and the purchase, hire, and construction of vessels." [12 Stat. 615.]

Under this resolution the claimant and petitioner below presented his vouchers, and received payment of the several sums allowed by the board.

The present suit, as has already been said, was brought by him against the government to recover the balance of the contract price of the mortar and steam tug-boats, with their fixtures, over and above the amount allowed by the board, after an investigation into the merits and the payment of the same under this joint resolution.

The Court of Claims decided that he was entitled to recover that balance, and gave judgment for him against the United States for \$112,748.76; finding, also, that the value of the mortar-boats and tug-boats was \$274,408.80.

Mr. Justice NELSON delivered the opinion of the court.

There has been a good deal of discussion between the learned counsel upon the questions, whether or not General Fremont possessed competent power, as commander of the military department, to make a valid contract with the petitioner for the construction of the boats, in the absence of any authority from the Quartermaster-General or

Secretary of War; and if not, whether the delivery of the boats, acceptance by the secretary, and employment in the service of the government, did not operate as a ratification of the same? In the view the court have taken of the case, it is not material how these questions are answered. For the purposes of the decision, we may admit the competency of the power.

The Secretary of War, subject to the authority of the President, is at the head of the department of the government on whom the duty devolved to provide these boats for the military expedition in contemplation by General Fremont, after their construction had been determined on. The head of the appropriate bureau of this branch of the service is the quartermaster-general, who is under the direction of the secretary. And whether the contracts for the construction were made by General Fremont or by the quartermaster-general, the source of the authority is the head of the War Department. And whether he makes the contracts himself, or confers the authority upon others, it is his duty to see that they are properly and faithfully executed; and if he becomes satisfied that contracts which he has made himself are being fraudulently executed, or those made by others were made in disregard of the rights of the government, or with the intent to defraud it, or are being unfaithfully executed, it is his duty to interpose, arrest the execution, and adopt effectual measures to protect the government against the dishonesty of subordinates. This duty is too plain and imperative to call for comments. As the head of the department under whose charge the contracts were made and were being carried into execution, and over which he had the superintendence and control, he was responsible to the government for any detriment to its interests which it was reasonably within his power to prevent or remedy. We do not agree, therefore, that there was anything unusual, harsh, or unjustifiable on the part of the secretary, if there existed well-grounded suspicions or facts unexplained, tending strongly to the conclusion that contracts had been entered into, and debts incurred, within this military district, in disregard of the rights of the government, in issuing the order to suspend the payment of all claims against it. This was a proper if not an indispensable step to prevent the consummation of the frauds. He would have been recreant to his duty if he had acted otherwise; and after having thus suspended these claims upon grounds and for the reason stated, which we are of opinion fully justified him, unless some provision had been made affording an immediate opportunity to the claimants to exhibit their claims, and establish their justice and integrity, their only remedy would have been an appeal to Congress or to the Court of Claims, which, as then organized, had no power to render judgment against the government. Both these bodies were soon to be in session at Washington, so that, without any great delay, they could have been presented there, examined, and allowed or rejected. But these tribunals were distant from the place where these contracts had been made and were being carried into execution, and a resort to them would have occasioned delay and involved much expense. Under these circumstances, although they were the appropriate and, we may say, only legal tribunals to investigate and adjust claims that the heads of de-

partments had felt it their duty to suspend or reject, it was fit, and commendable in the secretary, to appoint this board of commissioners to meet at once at a place where all the transactions had occurred out of which the claims and demands in dispute originated. It was impracticable for the secretary himself to hear and adjust them, even if the parties had desired it. The only immediate relief, therefore, within his power to provide, consistent with his duty under the circumstances, was to appoint persons to represent him. * * *

Dismissing the Petition.

3. THE FLOYD ACCEPTANCES.

(Supreme Court of the United States, 1868. 7 Wall. 666, 19 L. Ed. 169.)

Appeals from the Court of Claims.

Mr. Justice MILLER delivered the opinion of the court.

The cases before us are demands against the United States, founded upon instruments claimed to be bills of exchange, drawn by Russell, Majors & Waddell, on John B. Floyd, Secretary of War, and accepted by him in that capacity; purchased by plaintiffs before maturity, for a valuable consideration, and, as they allege, without notice of any defence to them.

Mr. Pierce, in his petition, relies on the facts that the signature of John B. Floyd, to these acceptances, is genuine, and that he was at the time of the acceptance Secretary of War, as sufficient to establish his claim. He avers that Floyd, as Secretary of War, had authority to accept the drafts, and that by his acceptance the United States became bound. It is evident that he means by this merely to assert, as a principle of law, that, by virtue of his office, the secretary had such authority, and not that there existed, in this case, special facts which gave such authority; for he mentions no such facts in his petition, and when the solicitors for the defendant undertook to show under what circumstances the bills were issued and accepted, he objected to the evidence. Its admission is one of the alleged errors on which he brings the case to this court.

Both Mr. Pierce and his counsel, therefore, claim to recover on the doctrine that when a party produces an instrument in the form of a bill of exchange, which he has purchased before its maturity, drawn on the Secretary of War, and accepted by him, he has established a claim against the government which admits of no inquiry into the circumstances under which the acceptance was made.

The other defendants, also, in their original petitions, assert and rely upon the same principle; but they have also filed amended petitions, in which they set forth facts connected with the acceptance of the secretary, which they deem sufficient to establish his right or authority to accept. Most of the facts, found under the issues made by these amended petitions, were also found under the general issue in Pierce's case, notwithstanding his objection; so that, if they avail the other plaintiffs, they will also support his claim.

It will be convenient, therefore, to consider, first, the proposition on which he rests his case, which, if found to be sound, disposes of all the cases in favor of plaintiffs.

One of the main elements of that proposition, much and eloquently urged upon our attention, seems to be too well established by the decisions of this court, to admit now of serious controversy. It must be taken as settled, that when the United States becomes a party to what is called commercial paper—by which is meant that class of paper which is transferable by indorsement or delivery, and between private parties, is exempt in the hands of innocent holders from inquiry into the circumstances under which it was put in circulation—they are bound in any court, to whose jurisdiction they submit, by the same principles that govern individuals in their relations to such paper.

Conceding, then, for the sake of argument, that the instruments under consideration are, in form, bills of that character, and that the signature of Floyd is genuine, and that he was at the time Secretary of War, there remains but one question to be considered essential to plaintiffs' right to recover, and that concerns the authority of the secretary to accept the bills on behalf of the government.

It is not to be denied that, in the extensive and varied fiscal operations of the government, bills of exchange are found to be valuable instruments, of which it has the right to avail itself whenever they may be necessary. In the transfer of immense sums of money from one part of the country to another, and in the payment of dues at distant points, where they should properly be paid, it uses, as it ought to use, this time-honored mode of effecting these purposes.

In the case of such paper, issued by an individual, when we make ourselves sure of his signature, we are sure that he is bound, because the right to make such paper belongs to all men. But the government is an abstract entity, which has no hand to write or mouth to speak, and has no signature which can be recognized, as in the case of an individual. It speaks and acts only through agents, or more properly, officers. These are many, and have various and diverse powers confided to them.

An individual may, instead of signing, with his own hand, the notes and bills which he issued or accepts, appoint an agent to do these things for him. And this appointment may be a general power to draw or accept in all cases as fully as the principal could; or it may be a limited authority to draw or accept under given circumstances, defined in the instrument which confers the power. But, in each case, the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper, cannot be used to establish the authority by which it was originally issued. These principles are well established in regard to the transactions of individuals. They are equally applicable to those of the government. Whenever negotiable paper is found in the market purporting to bind the government, it must necessarily be by the signature of an officer of the government, and the purchaser of such paper, whether

the first holder or another, must, at his peril, see that the officer had authority to bind the government.

When this inquiry arises, where are we to look for the authority of the officer?

The answer, which at once suggests itself to one familiar with the structure of our government, in which all power is delegated, and is defined by law, constitutional or statutory, is, that to one or both of these sources we must resort in every instance. We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the Legislature, and the Judiciary, exercise powers in some sense left to the more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law. It would seem reasonable, then, that on the question of the authority of the Secretary of War to accept bills of exchange, we must look mainly to the acts of Congress.

The counsel for claimants, not altogether rejecting this view of the matter, maintain that the power is derived—

1st. From the true construction of the Constitution and acts of Congress.

2d. From the decisions of the Supreme Court of the United States; by which is probably meant only the authoritative construction of the Constitution and laws.

3d. From the usage of the government in similar cases.

We will examine these several alleged sources of the power in the reverse order to that here stated.

1. As regards usage, it must occur at once that if there are instances in which the use of bills of exchange by the officers of government is authorized by law, as undoubtedly there are, the use of them in such cases, however common, cannot establish a usage in cases not so authorized. It may also be questioned whether the frequent exercise of a power unauthorized by law, by officers of the government, can ever by its frequency be made to stand as a just foundation for the very authority which is thus assumed.

It is to be observed in this connection, that the Court of Claims finds as a fact, in *Pierce's case*, that "the evidence fails to establish any usage or practice in the different departments of the government, by virtue of which the Secretary of War was authorized to accept, in behalf of the United States, the bills in suit"; and so far as that case is concerned this inquiry might close there.

But in the finding of facts which the same court makes in the other three cases, it is said, "That it is, and has been the practice of the heads of departments, to accept drafts or bills of exchange for the transmission of funds to disbursing officers, or the payment of those serving in distant stations, or for services rendered." The usage here found is limited to specified classes of cases, and if authorized by law, can be no evidence of a usage in cases not so authorized. It cannot be held to support the allegation of a usage so

general as to apply to any case in which the head of the department may see proper to use it.

We make the further observation in this connection, that while it is readily to be seen that the exigencies of the business of the departments may require drafts to be drawn by them, and may justify drafts being drawn on them, which they ought to and do pay when presented, there can be no occasion for an acceptance by any department or officer of a draft drawn on either of them.

We do not think, therefore, that usage is a sufficient reliance as an authority for the acceptance of these drafts.

2. The United States v. Bank of the Metropolis is the case mainly relied on as establishing the doctrine contended for by plaintiffs, and is confidently asserted to be conclusive of the cases under consideration, unless overruled.

That case undoubtedly did decide, that when an officer of the government, authorized to do so, accepted a draft in behalf of the United States or one of the departments, the validity of the instrument could not be disputed in the hands of an innocent holder. We have already stated this as the established doctrine of this court. And that proposition was the principal, if not the only one, controverted in that case. An attentive examination of it will show that the authority of the officers to accept was not raised by counsel or considered by the court.

The Bank of the Metropolis being sued for certain balances in favor of the United States, pleaded as a set-off a draft drawn by Edwin Porter on Richard C. Mason, Treasurer of the Post Office Department, at ninety days, and accepted by him as Treasurer; and also four drafts at ninety days, drawn by James Reeside on Amos Kendall, Postmaster-General, and "accepted on condition that his contracts be complied with."

It does not appear to have been controverted that Mason had authority to accept the draft of Porter, by either the counsel for the government or the bank; and the court seem to have treated it as conceded.

The opinion of the court, after stating the facts, opens with the declaration that, "when the United States, by its authorized officer, becomes a party to negotiable paper, they have all the rights, and incur all the responsibilities of individuals who are parties to such instruments." And further on it is said, that "an unconditional acceptance was tendered to it (the bank) for discount; * * * all it had to look to was the genuineness of the acceptance, and the authority of the officer to give it." If this language has any significance, it is that the authority of the officer, like the genuineness of the signature, is always to be inquired into at the peril of the party taking an acceptance purporting to bind the government.

Only a small part of that elaborate opinion is devoted to Porter's draft, and to the questions involved in it, and the remainder of it is occupied in discussing the effect of the condition annexed to the acceptance of Reeside's draft on its commercial character, and to determining what is implied in that condition.

It seems, therefore, quite clear that no consideration whatever was

given by the court to what constituted an authority to draw or accept bills of exchange; but that it was impliedly held to be a matter always open to inquiry when the draft was attempted to be enforced against the government. Nor are we aware of any case in this court in which the rule for determining that authority has been laid down.

Recurring, then, to the written law as the exclusive source of such authority, we may confidently assert that there is no express authority to any officer of the government to draw or accept bills of exchange.

Our statute books are filled with acts authorizing the making of contracts with the government through its various officers and departments, but, in every instance, the person entering into such a contract must look to the statute under which it is made, and see for himself that his contract comes within the terms of the law.

Does the contract, called a bill of exchange, stand on any different footing? It is true, that when once made, by a person having authority to make it, in any given case, it is not open to the same inquiries, in the hands of a third party, that ordinary contracts are, as to the justice, fairness, and good faith which attended its origin, or any of its subsequent transfers; but, in reference to the authority of the officer who makes it, to bind the government, it is to be judged by the same rule as other contracts.

The authority to issue bills of exchange not being one expressly given by statute, can only arise as an incident to the exercise of some other power. When it becomes the duty of an officer to pay money at a distant point, he may do so by a bill of exchange, because that is the usual and appropriate mode of doing it. So, when an officer or agent of the government at a distance, is entitled to money here, the person holding the fund may pay his drafts. And whenever, in conducting any of the fiscal affairs of the government, the drawing a bill of exchange is the appropriate means of doing that which the department, or officer having the matter in charge, has a right to do, then he can draw and bind the government in doing so. But the obligation resting on him to perform that duty, and his right and authority to effect such an object, is always open to inquiry, and if they be found wanting, or if they be forbidden by express statute, then the draft or acceptance is not binding on the government.

It cannot be maintained that, because an officer can lawfully issue bills of exchange for some purposes, that no inquiry can be made in any case into the purpose for which a bill was issued. The government cannot be held to a more rigid rule, in this respect, than a private individual.

If A. authorizes B. to buy horses for him, and to draw on him for the purchase-money, B. cannot buy land and bind A., by drawing on him for the price. Such a doctrine would enable a man, in private life, to whom a well-defined and limited authority was given, to ruin the principal who had conferred it. So it would place the government at the mercy of all its agents and officers, although the laws under which they act are public statutes. This doctrine would enable the head of a department to flood the country with bills of exchange, acceptances, and other forms of negotiable paper, without authority

and without limit. No government could protect itself, under such a doctrine, by any statutory restriction of authority short of an absolute prohibition of the use of all commercial paper.

In accordance with these views, we are of opinion that, as there can be no lawful occasion for any department of the government, or for any of its officers, or agents, to accept drafts drawn on them, under any statute or other law now known to us, such acceptances cannot bind the government.

An examination of the facts found by the Court of Claims, confirms the views already stated.

Counsel for the plaintiffs seem to have been of the opinion, from the start, that there was nothing in the nature of the transaction which would support the paper on which they sued, for they steadily resisted all efforts on the part of government to give the facts in evidence; and in the arguments made in this court, the right to recover is rested almost exclusively on the proposition that, because in some cases the secretary might lawfully accept, it must be presumed in their favor that these drafts were lawfully accepted.

It seems to us that such a transaction can be defended on no principle of law, and that, in thus lending to Russell & Co. the name and credit of the United States, the secretary was acting wholly beyond the scope of his authority. The paper was, in fact, accommodation paper, as it was found to be by the Court of Claims, by which the secretary undertook to make the United States acceptor for the sole benefit of the drawers. It was a loan of the credit of the government volunteered by him, without consideration and without authority. That the transaction was not payment, nor intended to be payment, for the supplies furnished, is clear, because the acceptances were not expected to be paid by the government, nor payable at the treasury, but were to be met by the drawers at the bank with which they dealt. These drafts did not interrupt in the least the regular payments made to Russell & Co. by the Quartermaster's Department, according to their contracts. Nor do the drafts seem to have had any relation to anything due on these contracts, or to what might become due before their maturity. It was, therefore, not payment, nor so considered by either party.

But if these acceptances can be considered as payments, they were payments in advance of the service rendered and supplies furnished—payments made before anything was due. They are in that view not only without authority of law, but are expressly forbidden by the act of January 31, 1823. The first section of that statute, which has never been repealed, enacts "that, from and after the passing of this act, no advance of public money shall be made in any case whatever; but in all cases of contracts for the performance of any service, or the delivery of articles of any description for the use of the United States, payment shall not exceed the value of the services rendered, or the articles delivered previous to such payment."

The transaction by which these drafts were accepted was in direct violation of this law, and of the limitations which it imposes upon all officers of the government. Every citizen of the United States is

supposed to know the law, and when a purchaser of one of these drafts began to make the inquiries necessary to ascertain the authority for their acceptance, he must have learned at once that, if received by Russell, Majors & Waddell, as payment, they were in violation of law, and if received as accommodation paper, they were evasions of this law, and without any shadow of authority.

It is proper to observe, that it does not appear from this record, that anything remains due to Russell & Co., under their contract with the government, or that anything was due them at the maturity of any of these drafts, nor is there any attempt on the part of plaintiffs to show either of these things, or the state of the accounts between those contractors and the government at the time the drafts matured.

These cases have long been before the departments, before Congress, and the Court of Claims, and have been the subject of much laborious consideration everywhere. The amount involved is large, the principles on which the claims are asserted, are, to some extent, new, and we have given them a careful and earnest investigation. We are of opinion that the judgments rendered by the Court of Claims against the plaintiffs, must be
Affirmed.

4. UNITED STATES v. SPEED.

(Supreme Court of the United States, 1868. 8 Wall. 77, 19 L. Ed. 449.)

Appeal from the Court of Claims.

Mr. Justice MILLER delivered the opinion of the court.

The counsel for the appellant urges eight separate objections to this judgment, which we must notice in the order they are presented.

1. Pork-packing and curing bacon is not a business within the scope of the powers of the Secretary of War, or his subordinates.

If by this is meant that the War Department has no authority to enter into the business of converting hogs into pork, lard, and bacon, for purposes of profit or sale as individuals do, the proposition may be conceded. But, if it is intended to deny to the department this mode of procuring supplies when it may be the only sufficient source of supply for the army, the proposition is not sound. The Commissary Department is in the habit, and always has been, of buying beef cattle and having them slaughtered and delivered to the forces. Is there no power to pay the butchers who kill for their services? That is just what the claimants contracted to do with the hogs which the government had purchased of other parties, and it is for this butchering and curing the meat that the government agreed to pay. The proposition places a construction altogether too narrow on the powers confided to the War Department in procuring subsistence, which in time of war, as this was, must lead to great embarrassment in the movement and support of troops in the field. * * *

4. That it is not binding on the United States, because there was no advertisement for proposals to contract.

This objection is founded on the act of March 2, 1861, 12 Stat. at Large, 220.

But that statute, while requiring such advertisement as the general rule, invests the officer charged with the duty of procuring supplies or services with a discretion to dispense with advertising, if the exigencies of the public service require immediate delivery or performance.

It is too well settled to admit of dispute at this day, that where there is a discretion of this kind conferred on an officer, or board of officers, and a contract is made in which they have exercised that discretion, the validity of the contract cannot be made to depend on the degree of wisdom or skill which may have accompanied its exercise. * * *

5. SMOOT'S CASE.

(Supreme Court of the United States, 1872. 15 Wall. 36, 21 L. Ed. 107.)

Appeal and cross-appeal from the Court of Claims.

Mr. Justice MILLER delivered the opinion of the court.

Mr. Smoot claims of the United States a large sum of money for the profits which he might have made out of two contracts with Quartermaster Eakin, for delivering cavalry horses for the use of the army—two thousand five hundred at St. Louis and two thousand at Chicago. It is neither alleged nor proved that he ever tendered a horse at either place, or attempted otherwise to perform his contract, or that he was ready to do so, or that he owned any horses, or had expended a dollar in preparing to fulfil his contract. The proposition on which the claimant rests his right to these speculative profits is not on account of anything he had done, or offered to do towards performance, or any actual loss suffered, but that after the contract was made, the cavalry bureau of the War Department adopted and published rules governing the inspection of horses purchased for that service, differing from those in use at the time the contract was made. It is not asserted that these rules required a higher or more difficult standard of quality in the horses, but that the mode in which that standard was to be ascertained was so changed as to impose a greater hardship, or burden, upon the contractor. Nor is it claimed that these new regulations were adopted with special reference to their application to Smoot's contracts. They were a new regulation of the business of inspection of a general character. The contracts sued on, which are identical, except in the number of horses and the place of delivery, provided for an inspection. But it is argued that the new regulations were not only a departure from those in use when the contracts were made, and imposed an additional burden on the contractor, but that conceding the right of the bureau to make proper and reasonable regulations for inspection, these were unreasonable and improper. The two points of difference in the new and the old mode of inspection most earnestly pressed in the argument are:

1. That by the new regulations the horses offered must remain at

the expense of the contractor twenty-four hours in the inspection yard, into which no other person than the inspector and his assistants shall be permitted to enter until the inspection is completed.

2. That all horses presented for inspection that are manifestly an attempt at fraud on the government, because of incurable disease, or any purposely concealed defect whatever, shall be branded on the left shoulder with the letter R.

The argument founded on these rules is presented under two propositions:

1. That the adoption of them by the cavalry bureau rendered it impossible for the contractor to perform his contract, because no owner of horses would sell to him subject to have them branded as a fraud by inspectors of whom he knew nothing, and who might be incompetent or oppressive.

2. That the application of these rules to horses tendered under claimant's contract absolved him from the obligation of performance, or tender, or offer to perform, and left him at full liberty to sue for the profits which he had done nothing to earn beyond making the contract.

There is in a large class of cases coming before us from the Court of Claims a constant and ever recurring attempt to apply to contracts made by the government, and to give to its action under such contracts, a construction and an effect quite different from those which courts of justice are accustomed to apply to contracts between individuals. There arises in the mind of parties and counsel interested for the individual against the United States a sense of the power and resources of this great government, prompting appeals to its magnanimity and generosity, to abstract ideas of equity, coloring even the closest legal argument. These are addressed in vain to this court. Their proper theatre is the halls of Congress, for that branch of the government has limited the jurisdiction of the Court of Claims to cases arising out of contracts express or implied—contracts to which the United States is a party in the same sense in which an individual might be, and to which the ordinary principles of contracts must and should apply.

It would be very dangerous, indeed, to the best interests of the government—it would probably lead to the speedy abolition of the Court of Claims itself—if, adopting the views so eloquently urged by counsel, that court, or this, should depart from the plain rule laid down above, and render decrees on the crude notions of the judges of what is or would be morally right between the government and the individual.

In illustration of this course of observation the proposition that the regulation concerning branding the horses fraudulently presented for inspection made it impossible for the contractor to perform his contract, may be well cited.

As between individuals, the impossibility which releases a man from the obligation to perform his contract must be a real impossibility, and not a mere inconvenience. And while such an impossibility may release the party from liability to suit for non-performance, it does not

stand for performance so as to enable the party to sue and recover as if he had performed.

The argument on this branch of the subject in the case before us loses sight of these principles.

There was no impossibility. It is a mere inconvenience. If the contractor has the money and purchases his horses before he offers them for inspection, there is presented no obstruction whatever, by the rules of inspection, in obtaining the required number of horses. It is only because he desires to transfer the risk and loss of rejection from himself to the parties of whom he purchases, that he has difficulty. The government made no agreement with him to protect him in this way. His ability to buy horses that would pass inspection was a part of the responsibility that he assumed, and which it was by no means impossible to perform; if he had the money and was ready to pay when he bought the horses of their original owners. Certainly no such circumstance as this would be set up for a moment in an ordinary suit between individuals as an impossibility, which released the party from his contract.

But suppose the contract had been between private parties, and an epidemic had prostrated every horse in the country with disease for the forty days allowed to buy and deliver sound horses by this contract. Will any one assert that this would authorize the contractor to sue for the profits he could have made, if no epidemic had occurred, though he neither then nor afterwards bought, or delivered, or tendered a horse? While such a public misfortune might possibly (we do not say it would) have been a defence to a suit against him for non-performance, it could be the foundation of no claim on his part to recover as if he had performed.

Perhaps no class of contracts has been more frequently the subject of judicial consideration than those for the future delivery of personal chattels. Such a contract is this. A contract in which the delivery is a condition precedent to payment; for the provision is that the delivery is to be at Chicago and St. Louis, and the payment made afterwards at Washington; and the time of payment is expressly made dependent upon appropriations made or to be made by Congress.

In approaching the inquiry into the effect which the action of the bureau of cavalry, in adopting these new rules for inspection, had upon the rights of the parties to this contract, let us endeavor to free ourselves from the consideration that the government was one party to the contract, and that it was for a large number of horses; for we hold it to be clear that the principles which must govern the inquiry are the same as if the contract were between individuals, and the number of horses one or a dozen instead of four thousand. The increased difficulty arising from the number to be delivered in a given time was voluntarily assumed by the contractor, and he had the right, during the forty or fifty days allowed him, to deliver any number, smaller or greater, at one time.

We are also to remember that the question to be considered is not whether the action of the cavalry bureau would have been a defence if the claimant had been sued for a failure to perform his part of

the contract, but whether it was sufficient to authorize him to abandon the contract himself, and as a plaintiff recover against the other party the profits which he would have made if it had been fully performed.

With these views before us the regulations adopted can only have the effect claimed upon one or two grounds; namely, as a notification by the government that it refused to receive the horses according to the terms of the contract, by which refusal the other party was released from his obligation to tender; or that the government had disabled itself from complying, and therefore the other party was not bound to tender. The most recent work, and a very able one, on "The law of sales of personal property," lays down the rule on this subject as follows: "A mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end." Benjamin on Sales, 424. The English cases cited abundantly sustain the proposition. *Avery v. Bowden*, in the Court of Exchequer, 5 Ellis & Blackburn, 714, affirmed in the Exchequer Chamber, 6 Ellis & Blackburn, 953, is very much in point. It was an action arising out of a charter-party, one of the covenants in which was that the vessel should be at Odessa, and lay there forty running days, within which time the shipper was to furnish her cargo, unless war should be sooner declared between Russia and Great Britain. The vessel came to Odessa on the 11th March, and sailed away in ballast on the 17th April. It was proved that at four different times during this period the officers of the ship applied to the agent of the charterer for cargo, who said, "We have none for you," and at last said, "I have no cargo for you; you had better go away."

On this testimony a verdict was taken for the plaintiff, the shipowner, subject to the judgment of the court on the law of the case. The judges, both in the Exchequer Court and in the Exchequer Chamber, were unanimous in the opinion that this conduct of the agent did not relieve the plaintiff from the obligation to remain the forty days, and that on that count he could not recover.

In the case of *Phillpotts v. Evans*, 5 Meeson & Welsby, 475, the defendant, who had agreed to receive and pay for wheat, notified the plaintiff, before the time of delivery, that he would not receive it. The plaintiff tendered the wheat at the proper time, and the only question raised was, whether the measure of damages should be governed by the price of wheat at the time of the notice or at the time of the tender. Baron Park said: "I think no action would have lain for the breach of the contract at the time of the notice, but that plaintiff was bound to wait until the time of delivery to see whether the defendant would then receive it. The defendant might have chosen to take it and would have been guilty of no breach of contract. His contract was not broken by his previous declaration that he would not accept."

And though some of the judges in the subsequent case of *Hochsteer v. De La Tour*, 2 Ellis & Blackburn, 678, disapprove very properly of the extreme ground taken by Baron Park, they all agree that the refusal to accept, on the part of the defendant, in such case, must be absolute and unequivocal, and must have been acted on by the plaintiff.

In the case before us there was no such refusal. The officers of the government required of the plaintiff at all times the delivery of the horses of the kind and quality which he had agreed to deliver. And so far from refusing to accept, or intending to release the plaintiff from his obligation to deliver, it is found as a fact in the case that he was arrested and imprisoned by the military authorities for refusing to deliver the horses.

Nor can it be maintained that those regulations disabled the government from performing its contract. They were just as ready to accept and as able to pay for the horses, notwithstanding the regulation. It may be said that the regulation tied the hands of the government officers so that they could only accept horses inspected under it, and that to such inspection the plaintiff was not bound to submit. But to this proposition the remark of Baron Park is peculiarly applicable. The government was not bound to apply to horses furnished under a previous contract these subsequent regulations. They were general in their terms and were not adopted with a special view to these contracts. And the declarations of certain officers that they would be governed by them bound nobody. The correctness of this view is strikingly illustrated in this case, for the Court of Claims finds that the officers receiving cavalry horses at St. Louis did receive horses on all contracts made previous to the adoption of the new regulations under the old mode of inspection, and did not apply to them the objectionable rules, and for that reason they reject Smoot's claim as to the contract to deliver at St. Louis.

We think it was equally his duty to have tendered horses at Chicago, and if the new regulations would have relieved him at all from that duty, it would have been after he had made a tender, and objected to the application of the new rule of inspection, and the proper officer had refused to receive the horses without subjecting them to those rules. Until then he could not justly claim that the government had violated its contract.

In Mr. Smoot's case, he never had any declaration made to him or his agent from any one in charge of the execution of those contracts on the part of the government, that the rule would be applied to him or his contract. He accepted and acted upon declarations made to other parties and not to himself.

We do not, however, believe that this would have varied the matter. It would have been no great hardship for him to have so far attempted compliance with his contract as to have tendered twenty or fifty horses under it, and tested the action which the government officers would take when he was thus attempting to fulfil his contract and objecting to the application of the new rule. Then the officers of the government would have been legally called on to determine whether they would apply them or not. Until that time they were under no obli-

gation and had no right to commit themselves or others irrevocably on that subject.

On these grounds we think that the claimant had no right to recover on either of the contracts sued on. It follows that the judgment of the Court of Claims in favor of Smoot on the Chicago contract is reversed, and the case remanded for judgment in favor of the United States; and the judgment of that court on the St. Louis contract, the subject of the appeal by Smoot, is

Affirmed.

6. CLARK v. UNITED STATES.

(Supreme Court of the United States, 1877. 95 U. S. 539, 24 L. Ed. 518.)

Appeal from the Court of Claims.

This is a claim against the United States for the value of a steamer lost in the government service in September, 1865, and for her use for eight days before the loss occurred, at \$150 per day.

The Court of Claims found the following facts:

1. In September, 1865, at Brownsville, Texas, the claimant and Major O. O. Potter, an officer in the Quartermaster's Department, entered into an oral agreement, with the approval of General Steele, commanding the western division of Texas. The agreement was that the Quartermaster's Department should pay the claimant \$150 a day for the use of the steamer "Belle;" but no specific contract was made, or to be made, as to time, until she had made a trial trip from Brownsville to Ringgold Barracks and return, to prove her ability to perform the service for which the Quartermaster's Department needed a steamer; and, if she made a satisfactory trial trip, the parties were then to enter into a formal written contract for her future use at the same price per day. It was also at the same time agreed orally that the Quartermaster's Department was to run the steamer on her trial trip at the expense of the government, and that if she were lost on her trial trip the government should pay for her whatever three disinterested men should estimate her value to be.

2. Under this agreement the claimant delivered the steamer to the Quartermaster's Department, at Brownsville. The quartermaster then put his own captain and crew on the vessel, and sent her to Ringgold Barracks. On her voyage, while thus in the service of the government, she was wrecked, and proved a total loss. Three disinterested persons were then agreed upon and requested by Major Potter and the claimant to appraise the value of the vessel. They so acted, and, by a written award, found the vessel to be of the value of \$60,000. The claimant has also proved by evidence other than the award that \$60,000 was the reasonable value of the vessel. The steamer was in the service of the government before her loss eight days. The United States has not paid for the value of the vessel nor for her service.

3. The steamer "Belle" was previously owned by, and in the military possession of, the Confederate government. The claimant acquired his title to her about the year 1863, taking her in part payment of a

claim he held for supplies furnished by him to the Confederate Quartermaster's Department. At the time she was chartered by Major Potter, as set forth in the first finding, she was in the claimant's possession as alleged owner, and she was also in Mexican waters, beyond the jurisdiction of the United States.

Upon these facts the claim was dismissed.

The claimant then brought the case here.

Mr. Justice BRADLEY delivered the opinion of the court.

The first objection made to the claim is, that the contract was not in writing, as required by the act of June 2, 1862, entitled "An Act to prevent and punish fraud on the part of officers intrusted with the making of contracts for the government." 12 Stat. 411. This act provides:

"Sect. 1. That it shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, immediately after the passage of this act, to cause and require every contract made by them severally on behalf of the government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof, a copy of which shall be filed by the officer making and signing the said contract in the 'returns office' of the Department of the Interior (hereinafter established for that purpose), as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, as also a copy of any advertisement he may have published inviting bids, offers, or proposals for the same; all the said copies and papers in relation to each contract to be attached together by a ribbon and seal, and numbered in regular order numerically, according to the number of papers composing the whole return."

The act further provides that the officer shall affix an affidavit to his return, and makes it a misdemeanor to neglect making his return, and directs the heads of departments to furnish printed instructions and forms of contracts, &c.

It is contended on the part of the government that this act is mandatory and binding both on the officers making contracts and on the parties contracting with them; whilst the claimant insists that it is merely directory to the officers of the government, and cannot affect the validity of contracts actually made, though not in writing. The Court of Claims has heretofore held the act to be mandatory, and as requiring all contracts made with the departments named to be in conformity with it. The arguments by which this view has been enforced by that court are of great weight, and, in our judgment, conclusive. The facility with which the government may be pillaged by the presentment of claims of the most extraordinary character, if allowed to be sustained by parol evidence, which can always be produced to any required extent, renders it highly desirable that all contracts which are made the basis of demands against the government should be in writing. Perhaps the primary object of the statute was to impose a restraint upon the officers themselves, and prevent them from making reckless engagements for the government; but the considerations referred to

make it manifest that there is no class of cases in which a statute for preventing frauds and perjuries is more needed than in this. And we think that the statute in question was intended to operate as such. It makes it unlawful for contracting officers to make contracts in any other way than by writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law. We are of opinion, therefore, that the contract itself is affected, and must conform to the requirements of the statute until it passes from the observation and control of the party who enters into it. After that, if the officer fails to follow the further directions of the act with regard to affixing his affidavit and returning a copy of the contract to the proper office, the party is not responsible for this neglect.

We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a quantum meruit. In the present case, the implied contract is such as arises upon a simple bailment for hire; and the obligations of the parties are those which are incidental to such a bailment. The special contract being void, the claimant is thrown back upon the rights which result from the implied contract. This will cast the loss of the vessel upon him. A bailee for hire is only responsible for ordinary diligence and liable for ordinary negligence in the care of the property bailed. This is not only the common law, but the general law, on the subject. See Jones, *Bailm.*, p. 88; Story, *Bailm.*, sects. 398, 399; Domat, *Lois Civiles*, lib. 1, tit. 4, sect. 3, pars. 3, 4; 1 Bell, *Com.*, pp. 481, 483, 7th ed.

As negligence is not attributed to the employes of the government in this case, the loss of the vessel, as before stated, must fall on the owner.

Of course, the claimant is entitled to the value of the use of his vessel during the time it was in the hands of the government agents, which, as shown by the findings, was the period of eight days. This value, in the absence of any other evidence on the subject, may be fairly assumed at what was stipulated for in the parol contract. Though not binding or conclusive, it may be regarded as admissible evidence for that purpose. Neither party thought fit to adduce any other. The cases bearing on this subject are collected in Browne's *Treatise on the Statute of Frauds*, sects. 117-130; but they mostly refer to the question whether the contract, though void by the Statute of Frauds, can be regarded as conclusive evidence of the quantum meruit. Whether or not it is admissible as some evidence, though not conclusive on either party, is apparently not much discussed; though it seems to us that it may fairly be deduced from the tenor of the cases that the evidence is admissible. At all events, that is our view. As a declaration of the parties, it is entitled to some credence.

The stipulation in this case, as appears by the findings, was for \$150 per day. This would make the amount of the claim \$1,200. For this amount the claimant is entitled to a decree.

If objected that the petition contains no count upon an implied contract for quantum meruit, it may be answered, that the forms of pleading in the Court of Claims are not of so strict a character as to preclude the claimant from recovering what is justly due to him upon the facts stated in his petition, although due in a different aspect from that in which his demand is conceived.

The other objection relied on by the government in this case is, that the claimant had no valid title to the steamer as against the United States, having obtained her from the Confederate government, in 1863, in payment for supplies furnished to the Quartermaster's Department of that government. This objection cannot be sustained. When the contract was made with the claimant, the vessel was in Mexican waters, and not subject to the jurisdiction of the United States. The claimant was applied to for its use. It was agreed that he should be compensated. No question was made about his title, and it is not suggested that he was guilty of any concealment or suppression of the truth in regard to it. Under these circumstances, it would be bad faith on the part of the government, after getting possession of the steamer and getting it within its jurisdiction, under pretence of hiring it of the claimant, to set up that he had no title to it. This is so obviously in accordance with the justice of the case, that we deem it unnecessary to make any further observations on the subject.

The decree of the Court of Claims must be reversed, and the cause remanded with directions to enter a judgment in accordance with this opinion; and it is

So ordered.

Mr. Justice MILLER, with whom concurred Mr. Justice FIELD and Mr. Justice HUNT, dissenting.

While I agree to the reversal of the judgment in this case, and to so much of the opinion as gives compensation for the use of the vessel before she was destroyed, I cannot agree to the more important part of the opinion, which holds the contract void because it was not reduced to writing.

The act of June 2, 1862, which is interpreted by the court to be a statute of frauds, making all contracts of the Departments of War, Navy, and Interior void which are not reduced to writing and signed by the parties, is not, in my judgment, properly construed.

It cannot be doubted that it was competent for Congress to impose upon the officers of these departments the duty of having all their contracts made in writing and filed in the proper office, without making absolutely void a parol contract made on a fair consideration and within the scope of their authority. In other words, Congress had a right to give such directions to those officers as would secure a statement in writing of the contract itself, for the use of the proper officers of the government, without making it obligatory on the individual contracting with the government, so that his contract, otherwise valid, would be void for want of that formality.

Looking at sect. 1 of the statute, as it is cited in the opinion of the court, it will be found wanting in the essential words of all known statutes of fraud.

There is no declaration that a parol contract shall be void, or that it shall not be enforced, or that no suit may be sustained on it.

There is no language in it addressed to the party contracting with the government. It is obvious that the primary purpose of the statute—in my judgment, the only one—is to secure authentic and perfect statements of such contracts, and of the proposals, advertisements, bids, and all the papers relating to them, to be filed in an office at Washington, where they can be inspected by any one having an interest, and especially by those superior officers whose approval or rejection may affect their validity. The statute seems in terms to apply to contracts in existence when it was passed as well as to those to be made in future. Returns of all contracts are to be made and filed in the office created for that purpose, within thirty days, together with bids, advertisements, &c.

The second section requires the officer making these returns to verify them by affidavit; and the object of this undoubtedly was to have evidence on which the government could rely, of the precise nature of the contract, and of the circumstances under which it was made.

The third section imposes a penalty on the officer for failing to make returns to the proper office, as required by the statute, by a fine; but no penalty for making a contract not in writing and signed by the parties.

In short, I cannot conceive, looking to the whole statute, that Congress intended any thing more than to regulate the conduct of its own officers, in compelling them to furnish all the evidence in their power of the contract and the circumstances attending its negotiation; and it seems to me to be going a long way to hold that it was the purpose to establish an entirely new rule as to the validity of contracts, at variance with any law heretofore known in this country, or, perhaps, any other.

If that was the purpose, it is hard to see why contracts in the three departments mentioned are selected for the operation of the rule, while the far more numerous and equally important contracts of the Post Office, the Attorney-General's Office, the Treasury and the State Departments are left to be controlled by the law as it stood before.

If there is any branch of the public service where contracts must often be made speedily, and without time to reduce the contract to writing, it is in that of the army. Sudden occasions for supplies, for the occupation of buildings, for the transportation of food and munitions of war, are constantly arising, and in many of them it is impossible to do more than demand what is wanted, and agree to pay what it is worth. Did Congress intend to say that the patriotic citizen, who said "take of mine what is necessary," is to lose his property for want of a written contract, or be remitted to the delays of an act of Congress?

It seems to me that if Congress had been intending to enact a statute of frauds, they would have made some limitation of its operation to cases of future delivery of property or future performance of service, and would not have passed a statute like this, which, if its effect is such as the court declares, renders void all contracts for compensa-

tion for the thousand small services and supplies which are daily needed by those in the employment of the government for its use.

I think the construction given by the court unwarranted and unfortunate, and of sufficient importance to record my dissent from it.

7. UNITED STATES v. PACIFIC R. R.

(Supreme Court of the United States, 1887. 120 U. S. 227, 7 Sup. Ct. 490, 30 L. Ed. 634.)

Appeals from the Court of Claims.

FIELD, J. The Pacific Railroad Company, the claimant in this case, is a corporation created under the laws of Missouri, and is frequently designated as the Pacific Railroad of that state, to distinguish it from the Central Pacific Railroad Company incorporated under the laws of California, and the Union Pacific Railroad Company incorporated under an act of congress, each of which is sometimes referred to as the Pacific Railroad Company.

From the fourteenth of August, 1867, to the twenty-second of July, 1872, it rendered services by the transportation of passengers and freight, for which the United States are indebted to it in the sum of \$136,196.98, unless they are entitled to offset the cost of labor and materials alleged to have been furnished by them, at its request, for the construction of certain bridges on the line of its road. The extent and value of the services rendered are not disputed. It is only the offset or charge for the bridges which is in controversy, and that charge arose in this wise: During the civil war the state of Missouri was the theater of active military operations. It was on several occasions invaded by Confederate forces, and between them and the soldiers of the Union conflicts were frequent and sanguinary. The people of the state were divided in their allegiance, and the country was ravaged by guerrilla bands. The railroads of the state, as a matter of course, were damaged by the contending forces; as each deemed the destruction of that means for transportation necessary to defeat or embarrass the movements of the other. In October, 1864, Sterling Price, a noted Confederate officer, at the head of a large force, invaded the state, and advanced rapidly toward St. Louis, approaching to within a few days' march of the city. During this invasion, 13 bridges upon the main line and south-western branch of the company's road were destroyed. Gen. Rosecrans was in command of the Federal forces in the state, and some of the bridges were destroyed by his orders, as a military necessity, to prevent the advance of the enemy. The record does not state by whom the others were destroyed; but, their destruction having taken place during the invasion, it seems to have been taken for granted that it was caused by the Confederate forces, and this conclusion was evidently correct. All the bridges except four were rebuilt by the company. These four were rebuilt by the government, and it is their cost which the government seeks to offset against the demand

of the company. Of the four, two (one over the Osage river and on over the Moreau river) were destroyed by order of the commander of the Federal forces. The other two, which were over the Maramec river, it is presumed, were destroyed by the Confederate forces.

Soon after the destruction of the bridges, and during the same month, Gen. Rosecrans summoned to an informal conference, in St. Louis, several gentlemen regarded as proper representatives of the railroad company, being its president, the superintendent, and the engineer of the road, and several of the directors. The court below makes the following findings as to what there occurred.

"By Gen. Rosecrans it was stated that the immediate rebuilding of the bridges was a military necessity; that he should expect and require the company to do all in their power to put the roads in working order at the earliest possible moment; and that he intended to have what work they did not do, done by the government, and withhold from the freight earnings of the road a sum sufficient to repay the government for such outlays as in law and fact it should be found entitled to have repaid. The gentlemen present assured Gen. Rosecrans that they would do all in their power to rebuild the bridges, and put the roads in working order at the earliest moment, but they at the same time represented that several of the bridges, as they believed, had been destroyed by the proper military authority of the United States, and that in such cases the government was properly responsible for the loss, and should replace the bridges. Those which the public enemy had destroyed they conceded that the company should replace.

"Gen. Rosecrans replied, in substance: 'Gentlemen, the question of the liability of the government for repairing damages to this road is one of both law and fact, and it is too early now to undertake the investigation of that question in this stirring time. I doubt myself whether all the damages which you say the government should be responsible for will be found liable to be laid to the charge of the government. Nevertheless, whatever is fair and right I should like to see done. You tell me now, and I have been informed by some of your representatives individually, that the company's means are insufficient to make these large repairs, and make them promptly. Therefore I want to say to you that, as a military necessity, we must have the work done, and shall be glad to have the company do everything it can, and I will undertake to have the remainder done, and we will reserve out of the freights money enough to make the government good for that to which it shall be found to be entitled for rebuilding any or all of the bridges, and we will return the freights to you, or settle with you on principles of law and equity.' The gentlemen interested in the company reiterated their view of the case, that the company should pay for bridges destroyed by the public enemy, and that the government should replace at its own cost the bridges destroyed by its own military authorities."

The court also finds that these mutual representations and assurances were not intended or understood on either side to form a con-

tract or agreement binding on the government or the company; that no formal action upon them was taken by the board of directors; and that there was no proof that they were ever communicated to the directors, except as may be inferred from subsequent facts and circumstances mentioned; but that the company, through its directors and officers, promptly exerted itself, to its utmost power, to restore the roads to running order, and to that end co-operated with the government.

At the same time Gen. Rosecrans informed the secretary of war that the rebuilding of the bridges was "essential, and a great military necessity," in the defense of the state, and requested that Col. Myers should be authorized "to have them rebuilt at once, the United States to be reimbursed the cost out of freight on the road." The secretary referred the matter to the quartermaster general, who recommended that Gen. McCallum, superintendent of military roads, be directed to take the necessary measures immediately for that purpose. The secretary approved the recommendation, and Gen. McCallum was thereupon ordered to cause the bridges to be rebuilt by the quickest and surest means possible. It does not appear that the company had any notice of these communications, or of the order.

The bridge over the Osage river was destroyed on the fifth of October, 1864, by order of the officer commanding the central district of Missouri, acting under instructions from Gen. Rosecrans to "use every means in his power to prevent the advance of the enemy." The court finds that the destruction was ordered for that purpose, and that the exigency appeared to the officer, and in fact was, of the gravest character, and an imperative military necessity. The government rebuilt the bridge at an expense of \$96,152.65; and this sum it seeks to charge against the company.

The bridge across the Moreau was also destroyed by command of the same officer, under the same military exigency. The company commenced its reconstruction, but, before it was completed, the work was washed away by a freshet in the river. The government afterwards rebuilt it at an expense of \$30,801; and this sum it also seeks to charge against the company.

The two bridges across the Maramec were destroyed during the invasion as already stated, but not by the forces of the United States. They were, however, rebuilt by the government as a military necessity, at an expense of \$54,595.24; and this sum, also, it seeks to charge against the company. The court of claims allowed the costs of three of the bridges to be charged against the company, but rejected the charge for the fourth,—the one over the Osage river. The United States and the claimant both appealed from its judgment,—the claimant because the cost of the three bridges was allowed; the United States because the charge for one of the four was disallowed.

The cost of the four bridges rebuilt by the government amounted to \$181,548.89. The question presented is whether the company is chargeable with their cost, assuming that there was no promise on its part, express or implied, to pay for them. That there was no ex-

press promise is clear. The representations and assurance at the conference called by Gen. Rosecrans to urge the rebuilding of the bridges were not intended or understood to constitute any contract; and it is so found, as above stated, by the court below. They were rebuilt by the government as a military necessity, to enable the Federal forces to carry on military operations, and not on any request of or contract with the company. As to the two bridges destroyed by the Federal forces, some of the officers of the company at that conference insisted that they should be rebuilt by the government without charge to the company, and, though they appeared to consider that those destroyed by the enemy should be rebuilt by the company there was no action of the board of directors on the subject. What was said by them was merely an expression of their individual opinions, which were not even communicated to the board. Nor can any such promise be implied from the letter of the president of the company to the quartermaster general in November, subsequent to the destruction of the bridges, informing him that the delay of the war department in rebuilding them had prompted the company to "unusual resources;" that it was constructing the bridges over the Gasconade and the Moreau rivers; and that the only bridge on the main line to be replaced by the government was the one over the Osage river, the company having replaced all the smaller and was then replacing all the larger ones. The letter only imparts information as to the work done and to be done in rebuilding the bridges on the main line. It contains no promise, as the court below seems to have thought, that, if the government would rebuild the bridge over the Osage river, it should be reimbursed for any other it might rebuild on the main line of the company. Nor do we think that any promise can be implied from the fact that the company resumed the management and operation of the road after the bridges were rebuilt; but on that point we will speak hereafter. Assuming, for the present, that there was no such implication, we are clear that no obligation rests upon the company to pay for work done, not at its request or for its benefit, but solely to enable the government to carry on its military operations.

It has been held by this court in repeated instances that, though the late war was not between independent nations, yet, as it was between the people of different sections of the country, and the insurgents were so thoroughly organized and formidable as to necessitate their recognition as belligerents, the usual incidents of a war between independent nations ensued. The rules of war, as recognized by the public law of civilized nations, became applicable to the contending forces. Their adoption was seen in the exchange of prisoners, the release of officers on parol, the recognition of flags of truce, and other arrangements designed to mitigate the rigors of warfare. The inhabitants of the Confederate States on the one hand, and of the states which adhered to the Union on the other, became enemies, and subject to be treated as such, without regard to their individual opinions or dispositions; while during its continuance commercial intercourse between them was forbidden, contracts between them were sus-

pended, and the courts of each were closed to the citizens of the other. *Brown v. Hiatt*, 15 Wall. 184, 21 L. Ed. 128.

The war, whether considered with reference to the number of troops in the field, the extent of military operations, and the number and character of the engagements, attained proportions unequalled in the history of the present century. More than a million of men were in the armies on each side. The injury and destruction of private property caused by their operations, and by measures necessary for their safety and efficiency, were almost beyond calculation. For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the government. By the well-settled doctrines of public law it was not responsible for them. The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone, as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. The safety of the state in such cases overrides all considerations of private loss. *Salus populi* is then, in truth, *suprema lex*. These views are sustained in treatises of text writers, by the action of congress, and by the language of judicial tribunals. *Respublica v. Sparhawk*, 1 Dall. 357, 1 L. Ed. 174; *Parham v. Justices*, 9 Ga. 341; *Taylor v. Nashville & C. R. Co.*, 6 Cold. (Tenn.) 646, 98 Am. Dec. 474; *Mayor v. Lord*, 18 Wend. (N. Y.) 126.

Vattel, in his *Law of Nations*, speaks of damages sustained by individuals in war as of two kinds,—those done by the state, and those done by the enemy. And after mentioning those done by the state deliberately and by way of precaution, as when a field, a house, or a garden, belonging to a private person, is taken for the purpose of erecting on the spot a town rampart, or other piece of fortification, or when his standing corn or his store-houses are destroyed to prevent their being of use to the enemy, and stating that such damages are to be made good to the individual, who should bear only his quota of the loss, he says: "But there are other damages, caused by inevitable necessity; as, for instance, the destruction caused by the artillery in retaking a town from the enemy. These are merely accidents; they are misfortunes which chance deals out to the proprietors on whom they happen to fall. The sovereign, indeed, ought to show an equitable regard for the sufferers, if the situation of his affairs will admit of it; but no action lies against the state for misfortunes of this nature,—for losses which she has occasioned, not willfully, but through necessity and by mere accident, in the exertion of her rights. The same may be said of damages caused by the enemy. All the subjects are exposed to such damages; and woe to him on whom they fall! The members of a society may well encounter such risk of property, since they encounter a similar risk

of life itself. Were the state strictly to indemnify all those whose property is injured in this manner, the public finances would soon be exhausted, and every individual in the state would be obliged to contribute his share in due proportion,—a thing utterly impracticable." Book 3, c. 15, p. 402, § 232.

Three cases in congress, one before the house of representatives in 1797, and two before the senate, one in 1822 and one in 1872, illustrate this doctrine.

In the first of these a Mr. Frothingham, of Massachusetts, presented a petition to the house of representatives, asking compensation for a dwelling-house, the property of his mother, burned at Charlestown, in March, 1776, by order of Gen. Sullivan, then commanding the American troops at that place. The committee on claims, to whom it was referred, made a report that they found that the house, for which compensation was sought, was, with several other buildings in the vicinity at that time, in possession of the British troops; and that, for the purpose of dislodging them, the general sent a party of troops with orders to set fire to the buildings, which was done accordingly; and that they apprehended that the loss of houses and other sufferings by the general ravages of war had never been compensated by this or any other government; that, in the history of our Revolution, sundry decisions of congress against claims of this nature might be found; and that the claim presented rested upon the same basis with all others where sufferings arose from the ravages of war. As the government had not adopted a general rule to compensate individuals who had suffered in a similar manner, the committee were of opinion that the prayer of the petitioner could not be granted, and no further action was had upon the claim. Amer. State Papers, class 14, claims, p. 199.

In the second of the cases referred to, a Mr. Villiers, of Louisiana, presented a petition to the house of representatives, stating that during the invasion of the British in 1814–15, after the enemy had landed near the city of New Orleans, in order to prevent him from bringing up his cannon and other ordnance to the city, Gen. Morgan commanding the Louisiana militia, caused the levee to be cut through, at or near the plantation of the petitioner, whereby the greater part of his plantation was inundated, and remained so till after the departure of the invading army from the state; that in consequence the petitioner had suffered great losses in the destruction of his sugarcane, cane plants, and in the expenses of repairing the levee, appraised at \$19,250, for which he prayed compensation. The committee on claims, to whom the petition was referred, recommended that its prayer should not be granted, on the ground that the losses were sustained in the necessary operations of war, for which the United States were not liable; and their recommendation was adopted. Amer. State Papers, class 14, claims, p. 835; Annals Seventeenth Cong. (1st Sess.) pt. 1, p. 311.

The third of the cases referred to is that of J. Milton Best, which was much discussed in the senate. His claim was for the value of a dwelling-house and contents destroyed by order of the officer com-

manding the Union forces in defense of the city of Paducah, Kentucky, in March, 1864. The city being attacked by the Confederates in force, the Federal troops, numbering 700, were withdrawn into Fort Anderson. The claimant's house, which was about 150 yards from the fort, was taken possession of by the sharp-shooters of the enemy, who did great execution picking off men at the guns within the defenses. They were driven from the house by shells from the fort and gun-boats, and late that night the Confederates retired from their assault without success. They appeared with reinforcements the next morning, and the Union officer, regarding his command in great peril, his ammunition being nearly exhausted, gave orders for the destruction of all houses within musket-range of the fort. The claimant's loyalty was unquestioned. The officers in command at the post from time to time during the war testified to his reliability, and the effective aid he rendered the Union cause.

The senate committee on claims reported the case as one presenting the "simple question of who shall pay for the destruction of a loyal citizen's property, destroyed by the order of a commanding officer to save his imperiled army, at the claimant's home, a place never in possession of the enemy, and in a non-seceding state." Upon this question they say: "It appears to your committee that the facts establish a just claim against the government for private property taken and destroyed to prevent a greater destruction of its own property, and the massacre of its troops." They reported that "the injuries to the claimant's house, by shelling out the rebels in the battle of the twenty-fifth of March, [the day preceding the destruction of the property,] may be regarded as a casualty by the general ravages of war, which might properly be deducted from the amount of loss proved by claimant," and they made what they deemed a proper deduction on that account in the bill presented by them for the payment of the damages. The bill was intended to cover the value of his property at the time it was burned to prevent its use by the reinforced enemy on the following day. In the debate which followed, it was contended by advocates of the bill that while the damage by shelling from our own fort during the battle came within the ravages of war, the subsequent burning of the house to prevent its being used by the sharp-shooters of the enemy was a taking by the government of private property for public use, for which compensation should be made.

The bill passed in the senate January 5, 1871, but was not acted upon by the house during that congress. It again passed in the senate, April 8, 1872, and in the house, May 18, 1872. It was vetoed by the president, June 1, 1872. In his message to the senate the president, after speaking of the claim as one for compensation on account of the ravages of war, and observing that its payment would invite the presentation of demands for very large sums of money against the government for necessary and unavoidable destruction of property by the army, said: "It is a general principle of both international and municipal law that all property is held subject, not only to be taken by the government for public uses, in which case,

under the constitution of the United States, the owner is entitled to just compensation, but also subject to be temporarily occupied, or even actually destroyed, in times of great public danger, and when the public safety demands it; and in this latter case governments do not admit a legal obligation on their part to compensate the owner. The temporary occupation of, injuries to, and destruction of property, caused by actual and necessary military operations, is generally considered to fall within the last-mentioned principle. If a government makes compensation under such circumstances, it is a matter of bounty rather than of strict legal right." Cong. Globe, Forty-second Cong. (2d Sess.) pt. 5, p. 4155.

The message was referred to the committee on claims, and on the seventh of February, 1873, it was reported back with a recommendation that the bill be passed, the objections of the president to the contrary notwithstanding. On the twenty-fourth of the same month the bill was reached on the calendar, and was passed over upon objection. No further action was ever taken upon it in the senate, and consequently it never reached the house. The claim has been repeatedly presented to congress since, but has never been considered by either house. The principle that, for injuries to or destruction of private property in necessary military operations during the civil war, the government is not responsible, is thus considered established. Compensation has been made in several such cases, it is true; but it has generally been, as stated by the president in his veto message, "a matter of bounty rather than of strict legal right."

In what we have said as to the exemption of government from liability for private property injured or destroyed during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency, we do not mean to include claims where property of loyal citizens is taken for the service of our armies, such as vessels, steam-boats, and the like, for the transport of troops and munitions of war, or buildings to be used as store-houses and places of deposit of war material, or to house soldiers or take care of the sick, or claims for supplies seized and appropriated. In such cases it has been the practice of the government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause. *Mitchell v. Harmony*, 13 How. 134, 14 L. Ed. 75; *U. S. v. Russell*, 13 Wall. 623, 20 L. Ed. 474.

While the government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field, or measures taken for their safety and efficiency, the converse of the doctrine is equally true, that private parties cannot be charged for works constructed on their lands by the government to further the operations of its armies. Military necessity will justify the destruction of property, but will not compel private parties to erect on their own lands works needed by the government, or to

pay for such works when erected by the government. The cost of building and repairing roads and bridges to facilitate the movements of troops, or the transportation of supplies and munitions of war, must therefore be borne by the government.

It is true that, in some instances, the works thus constructed may afterwards be used by the owner. A house built for a barrack, or for the storage of supplies, or for a temporary fortification, might be converted to some purposes afterwards by the owner of the land, but that circumstance would impose no liability upon him. Whenever a structure is permanently affixed to real property belonging to an individual, without his consent or request, he cannot be held responsible because of its subsequent use. It becomes his by being annexed to the soil, and he is not obliged to remove it to escape liability. He is not deemed to have accepted it so as to incur an obligation to pay for it merely because he has not chosen to tear it down, but has seen fit to use it. *Zottman v. San Francisco*, 20 Cal. 96, 107, 81 Am. Dec. 96. Where structures are placed on the property of another, or repairs are made to them, he is supposed to have the right to determine the manner, form, and time in which the structures shall be built, or the repairs be made, and the materials to be used; but upon none of these matters was the company consulted in the case before us. The government regarded the interests only of the army; the needs or wishes of the company were not considered. No liability, therefore, could be fastened upon it for work thus done.

We do not find any adjudged cases on this particular point,—whether the government can claim compensation for structures erected on land of private parties, or annexed to their property, not by their request, but as a matter of military necessity, to enable its armies to prosecute their movements with greater efficiency; and we are unable to recall an instance where such a claim has been advanced.

It follows from these views that the government can make no charge against the railroad company for the four bridges constructed by it from military necessity. The court will leave the parties where the war and the military operations of the government left them. The judgment of the court of claims must therefore be reversed, and judgment be entered for the full amount claimed by the railroad company for its services; and it is so ordered.

8. ST. LOUIS HAY & GRAIN CO. v. UNITED STATES.

(Supreme Court of the United States, 1903. 191 U. S. 159, 24 Sup. Ct. 47, 48 L. Ed. 130.)

Appeal from the Court of Claims to review a judgment dismissing a petition for damages for the breach by the United States of a contract made with it by the claimant.

See same case below, 37 Ct. Cl. 281.

Mr. Justice HOLMES delivered the opinion of the court:

This is an appeal from a judgment of the court of claims dismissing the appellant's petition. 37 Ct. Cl. 281. The petition alleges a contract by the United States to buy 9,000,000 pounds of hay from the claimant at the rate of \$.61½ per hundred weight, a refusal by the government to take the hay at the rate of one sixtieth daily, as required by the contract, according to the claimant's interpretation, and a failure to accept 255,291 pounds out of the 9,000,000. The rest, it is admitted, was taken and paid for at contract rates. The claimant seeks compensation for an increased price paid by it, increased cost of transportation, and loss of anticipated profits, caused by the delay, all as damages for the breach of the contract, or, alternatively, the market value of the hay less the amount paid by the United States. The answer is a general denial.

The court of claims finds that during the late war with Spain an advertisement was published by a quartermaster for 9,000,000 pounds of hay, among other things, seemingly for use in Camp George H. Thomas, Georgia, and that in connection with it the following information was furnished: "The foregoing are the estimated quantities which will be required, but bids will be accepted in whole or in part * * * and awards made under accepted bids will provide that the quantities awarded may be increased or decreased at the option of the United States, not exceeding 20 per centum thereof * * * and further, that if the troops should be wholly or in part withdrawn, the awards shall become inoperative to the extent of such reduction. * * * Hay and straw. * * * Deliveries of the supplies to begin within five days from date of award, and proceed at daily rates of at least one sixtieth of amount, or in such quantities and at such times afterwards, as may be designated by the chief quartermaster," etc. A bargain was made on these terms on July 12, 1898. Shipments were made, amounting, on August 27, 1898, to 4,685,949 pounds. On August 28 the quartermaster telegraphed to the claimant not to ship any more hay until notified to do so. This suspension of orders was due to the withdrawal of troops. The claimant then had 100 carloads in transit, which it was obliged to sell for what it could get, and protested against the stoppage. At different dates between September 12 and May 18 following the quartermaster telegraphed orders for hay, which were filled. Hay meantime had risen in value, and cost the claimant more than it would have cost in the summer. Accordingly, the claimant asked to be relieved from delivery, but the quartermaster refused, holding

back money due to the claimant as security to compel performance. The claimant went on with deliveries, and in December was asking for orders "on our contract;" on April 27 returned a voucher "covering hay on our contract;" on May 27 sent a bill of lading and invoice "ordered upon our contract to-day;" and on June 24, 1899, wrote "We would like to know how soon you expect us to put in the balance of the hay due upon the contract, as we are anxious to get it all cleaned up." It would seem that no hay was ordered after June 13. The claimant delivered the hay, and received full payment for it under the contract, without protest or attempt to reserve any rights at that time. The last payment was made on July 24, 1899. On May 11, 1899, however, the claimant wrote to the quartermaster, claiming damages on account of the government not taking the hay at the rate of one sixtieth per day, and on June 28, and later, the quartermaster approved the claim. Although, no doubt, both parties supposed their agreement binding, the court of claims held, and it is not disputed, that the contract was within Rev. Stat. § 3744 (U. S. Comp. Stat. 1901, p. 2510), and not having been "reduced to writing, and signed by the contracting parties with their names at the end thereof," could not have been sued upon if it had not been performed. *Clark v. United States*, 95 U. S. 539, 24 L. Ed. 518; *South Boston Iron Co. v. United States*, 118 U. S. 37, 6 Sup. Ct. 728, 30 L. Ed. 69. See *Monroe v. United States*, 184 U. S. 524, 22 Sup. Ct. 444, 46 L. Ed. 670. It is argued by the claimant on this ground that it is entitled to maintain a quantum valebat.

On the facts stated it is evident that the claimant has no case. The invalidity of the contract is immaterial after it has been performed. When a lawful transfer of property is executed, it does not matter whether the terms of the execution were void or valid while executory; the transfer cannot be revoked or the terms changed. A promise to make a gift does not bind, but a gift cannot be taken back, and a transfer in pursuance of mutual promises is not made less effectual by those promises or by the fact that money was received in exchange. The contract may be void, as such, but it expresses the terms on which the parties respectively paid their money and delivered their goods. See *Savage v. United States*, 92 U. S. 382, 23 L. Ed. 660. The proposition does not need to be argued or explained more at length. Of course, different considerations would come in if the claimant had been subjected to a motive from which it had a right to be free, as, for instance, by fraud or duress. But there was nothing which the law could recognize as duress, and the suggestion that it was peculiarly the duty of the officers of the government to see that the contract was put in binding form is very far from making out an analogy to fraud. The claimant was bound to know the law at its peril. The agent of the United States made no representation, and the claimant in no way purported to submit its judgment to his, if that would have bettered its case.

But it is said that this is not the simple case of mutual performance of a void contract, but that the United States, although it has paid the price, has broken the contract in respect of time. It may be

said that if the United States, instead of paying for the hay, had set up the invalidity of the contract, the claimant could have sued on a quantum valebat. *Clark v. United States*, 95 U. S. 539, 542, 543, 24 L. Ed. 518, 519; *Bacon v. Parker*, 137 Mass. 309; 310, 311. And it might be argued that the same result would follow if the United States, after paying the price, were compelled to rely upon the invalidity of the contract in answer to a claim of damages for a breach. Acceptance of payment by the vendor is not necessarily a waiver of such a claim. *Garfield & P. Coal Co. v. Fitchburg R. Co.*, 166 Mass. 119, 123, 44 N. E. 119. But we need not consider the questions suggested, because we agree with the court of claims that there was no breach. The right to diminish the order, and to change the quantities and times, was reserved in the fullest and most express terms, and especially with regard to the event which happened,—the withdrawal of the troops. Therefore, if, in view of the protest and claim made by the claimant, we should assume that the payment of the contract price did not purport to be in full satisfaction of all claims under the contract, which would be going very far and would be against the findings, still there is no valid claim under it, because the United States has done all that it undertook to do. It is true that hay is an article varying greatly in price at different seasons of the year, and that would have been a reason for holding time of the essence, if the contract had fixed a time; but the contract left the time open, as we have said, and the claimant must be held to the bargain which it made, although it has been disappointed in reasonable hopes.

Judgment affirmed.

4. EFFECT OF WAR ON CIVIL RIGHTS AND LIABILITIES

1. GOODELL v. PIKE.

(Supreme Court of Vermont, 1867. 40 Vt. 319.)

Bill in chancery. The bill charges that the orator, now of Rockingham, lived in Somerset in 1855, when his wife ran away with one Oliver Pike to Wisconsin, taking with her the orator's infant son, Francis, aged about seven years. That soon after Oliver sent the boy to his brother, Aaron Pike, in Searsburg; that the orator thereupon made a verbal agreement with Aaron to keep the boy till he should be twenty-one, school, clothe, and maintain him, and teach him the trade of a bedstead maker, and pay him \$100 on his coming of age; that Francis lived with Aaron accordingly till August 31, 1864, when, being about seventeen years old, he enlisted into the United States service, by the procurement of Aaron; was mustered and went off to the war; that such enlistment was without the knowledge or consent of the orator; that Francis enlisted to the credit of Searsburg, and received a town order for \$500, as a bounty from that town; that September 2, 1864, Aaron procured Francis to make a will, which is set out in the bill, in hæc verba, by which he bequeathed all his property to Lucy S. Pike, and made Aaron executor; that Francis died at Port Hudson, Louisiana, November 26, 1864; that Aaron presented said will for probate, January 4, 1865, and fraudulently concealing from the court the fact of Francis' minority, and representing him to have been of full age when the will was made, procured the will to be allowed and established by the court January 20, 1865. That the orator did not know of his said son's enlistment, nor of his making a will, nor of his death, nor of the presentation of the will for probate, nor of the probate thereof, till after the time for appealing from such probate had elapsed. That Aaron and his wife fraudulently concealed from the orator knowledge of the enlistment, death, and probate of the will of his son till too late to take an appeal. That Aaron insists upon holding the property under the will, and threatens to collect for his own, or his wife's use, the town order of \$500. The orator insists that the will was void on account of the infancy of said Francis; that its probate was procured by the fraud of Aaron; that he is the sole heir of his son and entitled to the property; that Aaron Pike is insolvent, and if he gets hold of the money it will be lost.

Prayer. That Searsburg may be decreed to pay the money to the orator, and be enjoined in the meantime from paying it to anybody else; and that the other defendants may be decreed to surrender the order to the orator, and be restrained from setting up any title to it by virtue of said will and probate; and be enjoined in the meantime from negotiating or parting with it; and for further relief, &c. The joint and several answer of Aaron and Lucy Pike denied any fraud in the probate of the will. The town of Searsburg did not answer. The answer was traversed, and there was filed the following statement of facts, agreed upon by the parties: John Goodell, the

orator, is the father and heir at law of Francis Goodell, who died at Port Hudson, Louisiana, on the 26th of November, A. D. 1864. Said Francis Goodell was born at Monroe, in the state of Massachusetts, September 22, 1847. On the 31st day of August, 1864, said Francis Goodell enlisted, was uniformed, and was mustered into the service of the United States at Rutland, Vermont, by the provost marshal of the first district; on the same day the defendant, Aaron Pike, was duly appointed guardian of said Francis, and as such guardian, consented to such enlistment and muster. Immediately after said enlistment and muster, the said Francis returned to the house of the defendant, Pike, and on the 2d day of September, 1864, he executed the will. Said enlistment of Francis Goodell was without the knowledge or consent of the orator, nor had the orator any knowledge of the death of his said son until after said will had been admitted to probate, and until after the time within which an appeal could be taken had elapsed. This case was heard on bill, answer, replication and statement of agreed facts, at the September Term, Windham County, 1867, Barrett, Chancellor, when it was considered and ordered that Aaron Pike deliver said order for said five hundred dollars to the orator, and that he and his wife refrain from claiming or receiving payment thereof, and that said town pay the same to the orator, with the interest legally accrued thereon, and that the orator recover his costs in the suit of said Pike. The decree was made accordingly, and the defendants, Aaron and Lucy S. Pike, appealed.

STEELE, J. It is urged that this will, though made by an infant of the age of seventeen years, may have been valid as a soldier's will, by virtue of some ratification it may have received while the infant was in actual military service, and that its probate may have been, or may hereafter be, justified by proof of such a ratification.

We do not think the statute enables an infant to make a valid will under any circumstances. The statute of wills, in general terms, limits the right of disposing of property by testament to persons of full age. After declaring the forms which must be observed in their execution, it provides that "nothing in this chapter shall be construed to prevent any soldier in actual military service, or any mariner or seaman being at sea, from disposing of his wages, or other personal estate, as he might otherwise have done." We think the words "as he might otherwise have done," refer merely to the mode of execution. This view is warranted by the language, is sustained by its connection with the preceding sections, and is confirmed by the reason of the provision. The situation of soldiers in actual service, and of sailors at sea, renders it impracticable for them to observe the statutory forms in making wills, and this provision is made in view of that fact. It would not be reasonable to provide that an infant soldier's will made in due form while out of actual service would be invalid, and that the same will made without form while with his regiment in service would be valid. His infancy is just as much a disability in fact in the one case as the other, and we see no reason why it should not be in law. In England no distinction existed between soldiers and civilians as to the age necessary to make a valid testament, but

only as to the mode of execution. Either might dispose of personal property by will after arriving at the age of fourteen years. When our statute limited the testamentary privilege to persons of full age, it continued the distinction as to the mode of execution which existed before, and for which there was reason. It did not create a new distinction for which no reason existed. Soldiers and civilians stand equal in the law as to the testamentary power or privilege, but the soldier is excused from observing certain forms in exercising his privilege out of consideration for the necessary embarrassments of his situation while in actual service.

This will was absolutely invalid, and its probate was at the least unauthorized. The disability arose not from unsoundness of mind, the question with relation to which must always be a matter of judgment. It was an absolute disability depending upon an arbitrary fact which is not disputed. If the statute had limited the right to make wills to males, the probate of the will of a female would have been as easily justified as this. Still we are not now prepared to say that the probate of the will of a person, who should afterwards prove to be a minor, is void, or that it could, except in extreme cases, or for that reason alone, be set aside, or that it ever should be set aside if the fact of the infancy was doubtful, or had been contested and tried in the probate court, or if the heir at law had had actual notice of the presentment of the will for probate. These points we do not discuss or decide. We think the facts of this case are sufficient to warrant the court in deciding it upon the plainer ground that the probate was so procured as to amount to a fraud upon the heir at law. The court of chancery should find the fact of fraud upon less evidence, and restrain the legatee from claiming under the probate for a less serious fraud than would ordinarily be held sufficient, when, as in this case, the infancy is conceded, and the heir at law entirely unaware of the proceedings, and the probate manifestly and glaringly wrong. It turns out, in this case, that the infant testator enlisted at the age of seventeen; that he was living at the time with the defendant Aaron Pike; that the said defendant procured himself to be appointed the minor's guardian, in order to consent to his enlistment. The infant was to have a bounty of five hundred dollars from the town of Searsburg; and while still residing in the guardian's family after enlistment, he went with this guardian to Wilmington, and there made a will, appointing the said Aaron Pike his executor, and Aaron Pike's wife his sole legatee. The soldier went to the front, and soon died at Port Hudson. His father, who was his heir at law, knew neither of his enlistment, nor his death, until after the defendant Pike had procured the will to be probated. It is not claimed that the defendants made the least effort to notify the orator of his son's death, and the probate was thus effected at the interested instance of the husband of the sole legatee. The defendants concede that they knew of the alleged testator's infancy, and they do not claim to have brought the fact to the notice of the probate court, or that the court was otherwise informed of it. Taking all the facts together we are satisfied that the withholding from the probate court of all knowledge of this material fact was wilful, and for a corrupt purpose, and the pro-

bate procured thereby, was a fraud upon the heir at law from which the legatee should derive no advantage.

The question as to whether usually this proceeding should not be by petition, instead of a bill in chancery, is not legitimately involved in this case, because the necessity of an injunction upon the insolvent defendant, Aaron Pike, rendered a resort to the court of chancery necessary, even if otherwise it would not be proper.

It is urged that the decree should not in any event be affirmed, but the matter should be left open for the probate court to order a new hearing. As we hold that an infant can, under no circumstances, make a valid will, this is not necessary.

It is further insisted, that there may be debts against the infant's estate, but as the defendant town of Searsburg does not appeal from the decree of the Chancellor, and as the heir at law is entitled to the estate as against the defendant, Pike, we do not deem it necessary to discuss the case with reference to this unproved and merely supposable state of facts.

The decree of the chancellor is affirmed, and cause remanded.

2. STEWART v. KAHN.

(Supreme Court of the United States, 1870. 11 Wall. 493, 20 L. Ed. 176.)

Mr. Justice SWAYNE delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Louisiana. The record discloses the following case: On the 16th of April, 1866, the plaintiffs in error, citizens and residents of the State of New York, brought suit against the defendants in error in the Fourth District Court of New Orleans, upon a promissory note made at New York on the 10th day of August, 1860, by the defendants, under their firm name of Bloom, Kahn & Co., to the plaintiffs, by their firm name of A. T. Stewart & Co., for the sum of \$3226.24, payable at the office of A. Levy & Co., in the city of New Orleans, with the current rate of exchange on New York, seven months from date. The plaintiffs, by their petition, claimed also to recover a few dollars for the balance of an account. The note was duly protested at maturity for non-payment. On the 28th of the same month of April the defendant, Levy, filed his answer, wherein he alleged that he knew nothing of the correctness of the note, or account, and demanded full proof. He also pleaded the statutory prescription of that State of five years as a bar to the action. The other defendants, Bloom, Kahn & Adler, answered subsequently. They denied all the allegations of the petition, and also set up the defence of prescription.

A statute of the State provides, that when "new facts" are alleged in the answer, "neither replication nor rejoinder shall be admitted." The facts are "considered as denied by the plaintiff." Code, art. 329.

Kahn was examined upon interrogatories, and answered that the defendants' firm was constituted as alleged in the plaintiffs' petition, and their place of business at the date of the note was Clinton, Louisiana. Another witness testified that he had known the defendant

Levy, since the year 1854 or 1855; that Levy had resided in New Orleans since that time, and was there during the period of the rebellion. At the trial the plaintiffs submitted this testimony, and the note and protest, to the court. It does not appear that any evidence was offered touching the account. The court gave judgment for the defendants. Upon what ground it was given is not disclosed in the record.

The plaintiffs appealed to the Supreme Court of the State. In that court they insisted that the act of Congress of June 11, 1864, (13 Stat. 123,) entitled "An act in relation to the limitation of actions in certain cases," interrupted the running of the prescription, and entitled them to recover. The Supreme Court affirmed the judgment of the District Court. The record shows they held that "more than five years having elapsed after the maturity of the note before the citations were served on the defendants, the plea of prescription must be sustained." It is clear that the judgment was given solely upon this ground. The case would have been more satisfactorily presented if a bill of exceptions had been taken at the proper time, and the material facts in that way placed upon the record. But enough is shown to develop clearly the action of the Supreme Court of the State, and the point we are called upon to review. There is no controversy as to the facts. Under the circumstances, a refusal on our part to exercise the jurisdiction invoked would involve a sacrifice of substance to form and unwarrantably defeat the ends of justice.

Our attention has been called to the second section of the act of Congress of February 5, 1867, amending the Judiciary Act of 1789. 14 Stat. at Large, 385. That section is to a great extent a transcript of the 25th section of the prior act. There are several alterations of phraseology which are not material. A change of language in a revised statute will not change the law from what it was before unless it be apparent that such was the intention of the legislature. *Theriat v. Hart*, 2 Hill (N. Y.) 381, note; *Douglass v. Howland*, 24 Wend. (N. Y.) 47. But at the close of the second section there is a substantial addition and omission. The addition in no wise concerns this case, and need not be remarked upon. The omission is of these words in the 25th section of the original act: "But no other error shall be regarded as a ground of reversal in any such case, as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute." 1 Stat. at Large, 85.

It is a rule of law that where a revising statute, or one enacted for another, omits provisions contained in the original act, the parts omitted cannot be kept in force by construction, but are annulled. *Ellis v. Paige et al.*, 1 Pick. (Mass.) 43; *Nickols v. Squire*, 5 Pick. (Mass.) 168; *Bartlet v. King's Executors*, 12 Mass. 537, 7 Am. Dec. 99.

Whether the 25th section of the original act is superseded by the second section of the amendatory act is a point not necessary in this case to be determined; for, conceding the negative the question before us is within the omitted category, is presented by the record, and is the only one we are called upon to consider. It is alike within the

section in question of the original and of the amendatory act. In either view there is no jurisdictional difficulty.

In *Hanger v. Abbott*, 6 Wall. 532, 18 L. Ed. 939, this court held that the time during which the courts in the States lately in rebellion were closed to the citizens of the loyal States is, in suits since brought, to be deducted from the time prescribed by the statutes of limitations of those States respectively, although the statutes themselves contain no such exception, and this independently of the act of Congress of 1864. In the case of *The Protector*, 9 Wall. 687, 19 L. Ed. 812, the same rule was applied to the acts of Congress of 1798 and 1803, fixing the time within which appeals shall be taken from the inferior Federal tribunals to this court. The case before us was decided prior to the decision of this court in *Hanger v. Abbott*, with which it is in direct conflict. But apart from the act of 1864, it would present no ground of Federal jurisdiction. *Hanger v. Abbott* came into this court under the 22d section of the Judiciary Act of 1789, or if that section is superseded, under the second section of the amendatory act of 1867. Its determination, therefore, depends necessarily upon the construction and effect to be given to the act of 1864.

The note upon which the suit is founded matured upon the 13th of March, 1861. The prescription of five years expired on the 13th of March, 1866. This action was commenced on the 16th of April, 1866, one month and three days after the period of limitation had elapsed.

The act of 1864 consists of a single section containing two distinct clauses. The first relates to cases where the cause of action accrued subsequent to the passage of the act. The second to cases where the cause of action accrued before its passage. The case before us belongs to the latter class. The first clause of the statute may, therefore, be laid out of view. The second enacts that "whenever, after such action—civil or criminal—such have accrued, and such person cannot, by reason of such resistance of the laws, or such interruption of judicial proceedings, be arrested or served with process for the commencement of the action, the time during which such person shall be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action."

A severe and literal construction of the language employed might conduct us to the conclusion, as has been insisted in another case before us, (see 11 Wall. 511, 20 L. Ed. 211, *United States v. Wiley*), that this clause was intended to be made wholly prospective as to the period to be deducted, and that it has no application where the action was barred at the time of its passage. Such, we are satisfied, was not the intention of Congress. A case may be within the meaning of a statute and not within its letter, and within its letter and not within its meaning. The intention of the law-maker constitutes the law. *United States v. Freeman*, 3 How. 565, 11 L. Ed. 724; *Same v. Babbitt*, 1 Black, 61, 17 L. Ed. 94; *Slater v. Cave*, 3 Ohio St. 80. The statute is a remedial one and should be construed liberally to carry out the wise and salutary purposes of its enactment. The construction contended for would deny all relief to the inhabitants of the loyal States having causes of action against parties in the rebel States if the pre-

scription had matured when the statute took effect, although the occlusion of the courts there to such parties might have been complete from the beginning of the war down to that time. The same remarks would apply to crimes of every grade if the offenders were called to account under like circumstances. It is not to be supposed that Congress intended such results. There is no prohibition in the Constitution against retrospective legislation of this character. We are of the opinion that the meaning of the statute is, that the time which elapsed while the plaintiff could not prosecute his suit, by reason of the rebellion, whether before or after the passage of the act, is to be deducted. Considering the evils which existed, the remedy prescribed, the object to be accomplished, and the considerations by which the law-makers were governed—lights which every court must hold up for its guidance when seeking the meaning of a statute which requires construction—we cannot doubt the soundness of the conclusion at which we have arrived.

On the 15th of April, 1861, President Lincoln issued his proclamation announcing the existence of the rebellion, and calling for volunteers to the number of 75,000 to suppress it. On the 19th of the same month he issued a further proclamation, announcing the blockade of Louisiana and other States in rebellion. By a proclamation of the 16th of August, 1861, he declared that the States named in it, Louisiana being one of them, were in a state of insurrection against the United States, and forbade all commercial intercourse between them and the other States in the Union. This proclamation was authorized by the 5th section of the act of July 13, 1861. The authority of the United States was excluded from the entire State of Louisiana from the date of the first proclamation down to the month of May, 1862, when the city of New Orleans and a small strip of adjacent territory lying along the Mississippi River below that city was reclaimed from the domination of the rebels by the military forces of the United States. Even then no court there, State or Federal, was open to the plaintiffs. Levy was there, but the other defendants were elsewhere in the State whither the arms of the United States had not penetrated. But, without pursuing the subject further, here was a period of more than a year to be deducted, according to the act of Congress, from the time necessary, under the State law, to create a bar, and this defeated the prescription relied upon by the defendants.

But it has been insisted that the act of 1864 was intended to be administered only in the Federal courts, and that it has no application to cases pending in the courts of the States.

The language is general. There is nothing in it which requires or will warrant so narrow a construction. It lays down a rule as to the subject and has no reference to the tribunals by which it is to be applied. A different interpretation would defeat, to a large extent, the object of its enactment. All those who could not sue in the courts of the United States, including the loyal men who were driven out by the insurrection and returned after it ceased, and those of the same class who remained at home during the war, would be deprived of its benefits. The judicial anomaly would be presented of one rule of property in the Federal courts, and another and a different one in the

courts of the State, and debts could be recovered in the former which would be barred in the latter. This would be contrary to the uniform spirit of the National jurisprudence from the adoption of the Judiciary Act of 1789 down to the present time.

The act thus construed, it is argued, is unwarranted by the Constitution of the United States, and therefore void.

The Constitution gives to Congress the power to declare war, to grant letters of marque and reprisal, and to make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy and to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

The President is the commander-in-chief of the army and navy, and of the militia of the several States, when called into the service of the United States, and it is made his duty to take care that the laws are faithfully executed. Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution.

In the latter case the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrections. It is a beneficent exercise of this authority. It only applies coercively the principle of law of nations, which ought to work the same results in the courts of all the rebellious States without the intervention of this enactment, *Hanger v. Abbott*, 6 Wall. 532, 18 L. Ed. 939. It promotes justice and honesty, and has nothing penal or in the nature of confiscation in its character. It would be a strange result if those in rebellion, by protracting the conflict, could thus rid themselves of their debts, and Congress, which had the power to wage war and suppress the insurrection, had no power to remedy such an evil, which is one of its consequences. What is clearly implied in a written instrument, is as effectual as what is expressed, *United States v. Babbitt*, 1 Black, 61, 17 L. Ed. 94. The war power and the treaty-making power, each carries with it authority to acquire territory, *American Insurance Company v. Canter*, 1 Pet. 511, 7 L. Ed. 242. Louisiana, Florida, and Alaska were acquired under the latter, and California under both. The act is within the canons of construction laid down by Chief Justice Marshall, *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579.

This objection to the statute is untenable.

The judgment of the Supreme Court of the State is reversed. The cause will be remanded to that court, with directions to overrule the plea of prescription, and to proceed in the case in conformity to law.

3. MUTUAL BENEFIT LIFE INS. CO. v. HILLYARD.

(Court of Errors and Appeals of New Jersey, 1874. 37 N. J. Law, 444, 18 Am. Rep. 741.)

The opinion of the court was delivered by

BEDLE, J. This suit was brought upon a policy of life insurance, issued by the Mutual Benefit Life Insurance Company, a corporation of this state, on December 27th, 1849, for \$5000, upon the life of John H. Hillyard, then and continuously afterwards, up to his death, a citizen and inhabitant of the state of Virginia. He died June 1st, 1862. The annual premium was \$302.50, which amount was paid each year, up to and including December 27th, 1860. The premium of December 27th, 1861, was not paid, by reason of the insurrection and condition of hostilities then existing in that part of the state of Virginia, where Hillyard and those for whose benefit the insurance was effected, resided; but as soon as such hostilities were terminated, that premium, with lawful interest, was tendered to the company, and by it refused. By the policy, the company, in consideration of \$302.50, paid at the date thereof, and of the annual premium of \$302.50, payable on December 27th of every year during the life of Hillyard, agreed to pay \$5000, the sum insured, within ninety days after notice and proof of death, subject to certain conditions, and among them, in substance, that, in default of the payment of any of the annual premiums on the days mentioned, the company should not be liable to pay the sum insured, or any part thereof; and that the policy should cease and determine, and all previous payments and profits thereon be forfeited to the company.

The main question involved is, as to the effect of the recent civil war upon the policy—whether the payment of the premiums was suspended merely, or the policy avoided. No argument can be drawn from the hardship of either view. It is undoubtedly important that life insurance companies should promptly receive their premiums, and clauses to secure that result will be strictly enforced, as in the case of *Catoir v. American Life Insurance & Trust Co.*, 33 N. J. Law, 487; but, at the same time, when such an unexpected event as a civil war between the states occurs, it is equally important to know whether the insured, if unable to pay the premium by reason of that, shall lose all benefit from the insurance, and forfeit to the company the whole amount paid, which may, as in this case, including principal and interest, nearly equal the sum insured. It is an injury to the company not to receive prompt payment, but it would be a greater injury to the insured to lose all benefit from the insurance. War always creates hardships, and private rights must necessarily suffer from the hostile condition; but the evident object and tendency of judicial action, is where the government has not created forfeitures, and where the question is one of the mere effect of the war ipso facto upon private contracts and interests, to interfere with them only so far as may be rendered necessary by the existence of hostilities, and when, to preserve them, would be inconsistent therewith. It would be impossible to so declare the law as that no injury would result, but it should be the purpose of

the court, as far as consistent with principle, to sustain the interests of both parties, the one as well as the other, in the policy, doing as little injury as possible to either. The difficulty in this case arises from the non-payment of the premium of December 27th, 1861. In an ordinary case, the policy would be forfeited, according to its terms; but if unlawful to pay the premium when due, by reason of the war then existing, the question to be settled is, how such state of war, or the non-payment for that cause, affects the contract. It cannot be disputed that the existence of the war, taken in connection with the proclamation of the President of August 16th, 1861, and the act of Congress of July 13th, 1861, which authorized the proclamation, suspended all amicable intercourse, and made it unlawful then to transmit the money for the premium from the insurrectionary state to this. That doctrine arises out of the fact of all wars, whether foreign or civil; but, in addition to that, the clear effect of the proclamation, with the force and authority of section 5 of the act of congress, was to make it incontestable that, during the insurrection, intercourse necessary to transmit money, was suspended. The transmission of money, among other consequences, involves intercourse inconsistent with a condition of hostilities, and therefore it was unlawful to remit it, and by the evident force of the act of congress alone, after the proclamation, it was unlawful to receive it as the result of any intercommunication between those of the belligerent states. How, then, was the contract of insurance affected by the non-payment of the premium for that cause, or by the war? The only ground upon which it can be claimed that the war ipso facto, dissolved the contract is this: That to make the annual payments, involved an act contrary to the laws of warfare and that act in this case consisting chiefly in the intercourse necessary to accomplish it, which would be unlawful. It is granted that to transmit money, would be unlawful, but the result sought does not follow from that alone. War does not defeat a debt, yet the right to collect it during the continuance of the strife, is suspended, and the creditor loses his interest. Let us analyze the case of a debt due, as for instance, for goods sold before the war, but payable at a time after its commencement, and to make the illustration as forcible as possible, payable at different times by instalments during the war. The actual contract is, the debtor having received the goods, that he shall pay for them at the times appointed. In the absence of hostilities, it is the right of the creditor to receive and the duty of the debtor to pay, but war having occurred, the debtor cannot discharge that duty without an infraction of the law. Any attempt to do it would be an act clearly inconsistent with the state of war, but the debtor is not discharged for that reason. The debt should be paid by the contract; the contract itself requires it, yet the payment may be suspended and the debt subsist, and it is so with any executed contract not obnoxious to the policy of warfare. Rights vested under it will be saved, but any immediate benefit is suspended. If the contract could be carried out by any hocus pocus action in making the payment of the several instalments, it would still be unlawful to do it, for the law does not require or tolerate any such irregularity, and therefore suspends the payment, leaving the claim disturbed as little as possible, and although the creditor must submit to

the loss, yet he is allowed as much benefit from his contract as is consistent with the state of war. It will thus be seen that it does not necessarily follow that when the contract itself requires payment, the contract will be entirely dissolved. The law strips the contract of its objectionable features and leaves the rest intact. There is a class of contracts, however, upon which the war works a complete dissolution, and among them are those termed continuing. They are of an executory nature merely, and where the contract in its essential features, if it subsists must violate the law governing hostilities. It is undoubted that no contract can be made during belligerency, and although a contract of partnership is made before the war, yet it contemplates the continuous performance of acts amounting to distinct contracts. The life of a partnership is in the continuance and performance of the transactions it contemplates. Without that the relation would be barren. It is of the nature of a partnership that there should be intercommunication of the partners; each also, is interested in the business and is affected by the acts of the other, and as stated by Chancellor Kent, in the great case of *Griswold v. Waddington*, 16 Johns. (N. Y.) 494, "when one of the parties becomes disabled to act, or when the business of the association becomes impracticable, the law as well as common reason, adjudges the partnership to be dissolved." Hence the agreement of partnership is not suspended, but dissolved. Although a contract of partnership is dissolved, yet, as to all transactions executed before the war, there is no rule of law requiring a forfeiture of the profits to the partner who happens to possess them. The remedy to collect them during the war would be suspended, yet the right to them remains. But this contract of insurance is not of the exact nature of a debt, nor is it of the character of a partnership. It is peculiar. If the premiums had all been paid previous to the war there would have been only a debt, payable at death, an event certain to happen, and if Hillyard had died before the premium of December 27th, 1861, had accrued, there is no reason in the policy of the law, or in plain justice, why, after the war, the sum insured could not have been collected. A mere contract of life insurance, subsisting at the breaking out of the war, without requiring the performance of an act inconsistent therewith, and especially with a clause, as in this, against entering into the military or naval service, is not in itself antagonistic to the laws governing a state of war, and, as already said, if it is to be condemned it must be upon the ground that it contains provisions for the payment of premiums which, if strictly carried out, would be antagonistic. How, then, should the law deal with this contract containing such provisions; shall the payments be suspended or the policy avoided? For the present I disregard the question of condition precedent, for that is confined to the mere interest of the parties, while this depends chiefly upon considerations of public policy. It is sufficient now to say, that on the payment of the first premium a right became vested in the continuance of the contract of insurance, but on condition that the premiums be promptly paid. The contract was executed to the extent that the premiums were paid, and the right thereby acquired was private property. It is the policy of all enlightened governments not to confiscate debts and credits, although the power to do it exists. 1 Kent, 65;

Brown v. United States, 8 Cranch, 110, 3 L. Ed. 504; *Hanger v. Abbott*, 6 Wall. 532, 18 L. Ed. 939. Chief Justice Marshall, in *Brown v. United States*, assumed it to be the universal practice not to exercise the right. This contract is of the general character of debts and credits, and the policy of the government would be to leave the interest acquired under it undisturbed by any act of confiscation. There is also a policy in the law, which is careful of private rights, and it is not confined to times of peace. When the dread necessities of war break up all friendly intercourse, disturbing and destroying trade, commerce, property and life itself, it is still the policy of the law to save from wreck and loss all private property and rights possible to be saved, consistent with the stern demands of the hostile state. The reason why contracts or transaction between belligerents are interdicted is, that they are in violation of the doctrine that all commerce, friendly intercourse, and trading with the enemy, are contrary to the nature of a state of war, but the destructive power of the interdiction should not be carried farther than necessary to enforce the doctrine. There is no reason why ante bellum contracts, not entirely executory, should not be preserved from dissolution, to the extent that they are not inconsistent with the duties and requirements of a condition of hostilities. The test to dissolve a pre-existing contract is its essential antagonism to the state of war. It is so in partnership; it is also so in contracts of affreightment. But if rights have been acquired under a contract, not substantially antagonistic, the law will either abridge or qualify it, or suspend its performance, in whole or in part, according to the nature of the contract. These are analogies to that effect. It is unlawful to insure enemies' property, yet a policy of that kind issued previous to a war may be qualified so as to save it from entire destruction. The case of *Furtado v. Rogers*, 2 B. & P. 191 (1792,) was an insurance effected in Great Britain, on a French ship, previous to the commencement of hostilities between Great Britain and France. The policy was in the usual form, including an insurance against captures. The ship was captured by British force. The court held "that when a British subject insures against captures, the law infers that the contract contains an exception of captures made by the government of his own country, and that if he had expressly insured against British capture, such a contract would be abrogated by the law of England." The court also said that the plaintiff was "not entitled to a return of the premium, because the contract was legal at the time the risk commenced, and was a good insurance against all other losses but that arising from capture by the forces of Great Britain." In that case the court did not consider the contract dissolved, but that it was subject to a qualification that it should not apply to British captures. To the same substantial effect are the cases of *Kellner v. Le Mesurier*, 4 East, 396; *Gamba v. Le Mesurier*, 4 East, 407.

In *Brandon v. Curling*, 4 East, 410, a kindred case, Lord Ellenborough, Chief Justice, after referring to the two *Le Mesurier* cases, says: "It follows, as a consequence of the same principle, that wherever the generality of the terms of assurance might, in their actual application to the covering of any particular risk, produce, if effect were given to them in their extended sense, a similar contravention of public

interest, the insurance must be construed in such manner as to exclude the particular event of peril, which could not be so made the subject of a legal insurance in direct terms by a British underwriter." He gives two instances of implied exceptions, that may arise in the application of general words of insurance; one of which is, that where an insurance is upon goods generally, a proviso shall be considered engrafted, as follows: "Provided, that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and assurer;" and the other is, that "the risk of detention of princes," &c., must be understood to be restrained and qualified by an implied proviso, "that it shall not extend to cover any loss happening in the course of any contraband adventure, in which the goods would become liable to seizure as forfeited by the laws of this country." These cases are referred to merely to show how contracts may be restrained or qualified, when, to carry them out according to the full scope of their terms, would be unlawful.

An instance of suspension of agreement exists in the case of a debt already alluded to. Another is in the suspension of a clause in a policy of insurance fixing a time within which suit must be brought. *Semmes v. Hartford Insurance Co.*, 13 Wall. 158, 20 L. Ed. 490. In that case, the Supreme Court say: "We have no doubt that the disability to sue, imposed on the plaintiff by the war, relieves him from the consequences of failing to bring suit within twelve months after the loss, because it rendered a compliance with that condition impossible, and removed the presumption which that contract says shall be conclusive against the validity of the plaintiff's claim." See, also, *Hanger v. Abbott*; also, *U. S. v. Wiley*, 11 Wall. 508, 20 L. Ed. 211. *The Protector*, 9 Wall. 687, 19 L. Ed. 812. In *Parsons on Contracts*, Vol. 2, p. 187, the author states that "a law may have the effect of suspending an agreement that was originally valid, and which it makes impossible without violation of law, and yet leave the contract so far subsisting that upon a repeal of the law, the force and obligation of the contract remain." See, also, *Baylies v. Fettyplace*, 7 Mass. 325; *Hadley v. Clarke*, 8 T. R. 259. In a Mississippi case, *Statham v. New York Life Insurance Co.*, 45 Miss. 581, 7 Am. Rep. 737, found, also, in 3 *Bigelow, Ins. Rep.* 650, a part of the opinion of Simrall, J., contains so much good sense on this subject that I will quote it: "As a general proposition, war suspends the performance of ante bellum contracts and denounces as illegal and invalid those made pendente bello. If an ante bellum contract is dissolved at all, it is because its performance is inconsistent with the duties and allegiance which the parties owe to their respective countries, and involves some violations or infringement of these, and which has not been performed in whole or in part by either party. The annihilation of such a contract would not be injurious to either party, but would rather dissolve their inconvenient relations. But if the contract has been partly executed by one party, by parting with money or other valuable things on the consideration and promise that the other will perform his part of the engagement, it would be gross injustice and repugnant to reason that intervening war should destroy the contract, devolving all the loss upon one party to the gain of the other.

Nor should that be so unless an overruling policy should so require, &c. If the contract may be preserved or performed without the transmission of money or property from one enemy to the other, or without their intercourse or correspondence, then no principle of law or policy, arising out of a state of war between their respective countries, would demand an abrogation of the contract or its non-performance." In that case, it was held that the contract could be performed by payment of the premium to an agent of the New York Company, residing in Mississippi, where the insured lived. In *Buchanan v. Curry*, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200, the defendant was an alien enemy of the United States, residing in Canada; one of the plaintiffs was a naturalized American citizen residing in New York state, and the other was also a British subject in Canada. The contract was for the delivery of timber, but made before the declaration of war in 1812. Some of the timber was delivered before the war. The places of delivery were so general that the plaintiffs could elect to deliver the timber in Canada or within the United States. It was held that the contract was not dissolved by the war, and that the plaintiffs could deliver the timber to an agent who resided in the United States, in performance of the contract.

The tendency of adjudication is to preserve and not to destroy pre-existing contracts. Where performance can be had, without contravening the laws of war, the existence of the contract is not imperiled, and even if performance is impossible the contract may still, when partly executed, be preserved by engrafting necessary qualifications upon it, or suspending its impossible provisions, if made so by the act of the law. If the contract in question can be saved while the war lasts, it should be; and it is clear to my mind that the law will allow a suspension of the payment of the premium, and permit the payment to be made on the return of peace, with proper interest, unless there is something in the terms of the contract to prevent it. There is no more hardship in that than in suspending the payment of a debt. There is more in the latter, for the creditor loses his interest; but the insurance company will receive it, as is right. The company should receive it because its ability is sustained by its premiums, and the interest accumulations. The nature of the contract is such that, when enforced, the equivalent for the sum insured should be made up. There is no question raised, in this case, as to the amount of interest tendered. If compound interest could be required, as perhaps it ought to be, the company would be reimbursed for the delay.

But it is said that the payment of premiums is a condition precedent, and, if not made with exactness, that there can be no excuse for it unless specially provided in the policy. It is difficult to define the precise nature of the condition for the annual payments. The contract is *sui generis*. It may be admitted that the payment of the premium is a condition precedent to any recovery, the same as the performance of an entire contract may be, but the payment after the first is not a condition precedent to the vesting of substantial rights, under the contract, although liable to be defeated by force of the clause of forfeiture. The payment of the first premium covers the whole lifetime, and makes a complete vested right to the sum insured, if death takes

place before another premium is payable, but if not it is subject to the payment of further premiums. This is not in the nature of a condition precedent to the vesting of a title to real estate. In such a case, if the condition becomes impossible to be performed, nothing vests, because the instrument creates no right at all without the complete performance of the condition. A condition, as affecting real estate, where its nature is most distinctly seen, if precedent, must be performed before any estate vests; if subsequent, it divests an estate vested. If the condition precedent is void or impossible to be performed, nothing vests. If the condition subsequent is void or impossible, the estate, having vested, remains undisturbed. The condition in question cannot, in any technical sense, be regarded as precedent or subsequent, so as to vest or divest rights under the policy. It is a condition in the contract, and a part of it, and peculiar, and arising out of the very nature of life insurance contracts. The policy is necessarily of the character of mutual agreements, partly executed on one side, and although the performance of some on the part of the insured may be precedent to the final performance by the company, yet we should subject it to the same restraints and influences of the law as any other contract. When the first premium is paid a full contract of insurance is completed, subject to conditions peculiar to that class of contracts. The use of the words condition precedent, Baron Martin, in a certain case, (*Bradford v. Williams*, L. R., 7 Exch. 261,) said he thought unfortunate; that "the real question, apart from all technical expression, is, what in each case is the substance of the contract." So far as the precedent payment of the premium in arrear is concerned it would, of course, have to be made before recovery. Time, also, is of the essence of the contract, and no fault or neglect of the party could excuse a non-payment; but why should not this, like any other contract, be subject to such qualifications and conditions as the law may impose? I am unable to discover any reason. This should have no immunity from the fate of every other contract, when, by an unexpected event, it becomes unlawful literally to carry it out. This subject, as we are now considering it, is free from any question of public policy, and cases excusing performance according to contract, by reason of a subsequent unlawfulness, are in point. In *Baylies et al. v. Fettyplace et al.*, 7 Mass. 325, the plaintiffs sold, in 1807, sugar to defendants at Boston, for which defendants promised to pay two several sums at different times, and to deliver within a reasonable time what were called certificates of debenture of the United States. These were to be issued by the government officers, and could not be obtained unless the sugars were exported. Within the reasonable time necessary for exportation, an embargo was laid by the United States. The court held that the embargo operated as a temporary suspension of the performance of the contract. Sewell, J., said that "the mere suspension of the exercise of this right operated equally upon the plaintiffs and defendants; was created by laws to which both were parties, and formed a part of that system of regulation to which they had referred themselves in the implied intentions, if not in the express letter of their contract." Sedgwick, J., said: "The defendants were, of course, prevented inevitably, and without any fault on their part, from performing their

promise. Now it is clearly settled, by innumerable authorities that, whenever a contract which was possible and legal at the time it was made, becomes impossible by the act of God, or illegal by an ordinance of the state, the obligation to perform it is discharged, or if such ordinance be temporary, the obligation is suspended during its continuance. (See references in note to that case.) In *Hadley v. Clarke*, 8 T. R. 259, in Court of King's Bench, where defendants contracted to carry the plaintiffs' goods from Liverpool to Leghorn. On the vessel arriving at Falmouth, in the course of her voyage, an embargo was laid on her until the further order of council—held, that such embargo only suspended, but did not dissolve the contract,” and that where the embargo lasted two years. In *Jones v. Judd*, 4 Coms. 412, the plaintiffs made a sub-contract to do work upon a canal in New York. Afterwards, the legislature passed an act which put an end to the original contract and the sub-agreement. The defendant had paid plaintiffs for all the work done, except ten per cent., which was not to be paid until the final estimate—held, that as the plaintiffs were prevented by authority of the state from completing their contract, they were entitled to recover. The act of the legislature excused the performance of the condition precedent of entire performance. The following are cases and references in the same direction as those cited: *Anglesea v. Rugeley*, 6 Ad. & El. (N. S.) 107; *Esposito v. Bowden*, 7 E. & B. 763; *Chitty on Contracts*, 804 (10 Am. ed.); 2 *Parsons on Contracts* (1st ed.) 187.

Warranties in contracts of marine insurance are always regarded as most imperative in their performance, yet Arnold, in Vol. 1, p. 585, of his valuable book on Insurance, says: “It may be stated generally, that compliance with a warranty will be dispensed with, if it be rendered unlawful by a law enacted since the time of making the policy.” The foundation of this doctrine is in the maxim that “the law does not seek to compel a man to do that which he cannot possibly perform:” and, as an illustration of it, the familiar instance is given in the books that, “if H covenants to do a thing which is lawful, and an act of Parliament comes in and hinders him from doing it, the covenant is repealed.” *Broom's Max.* 168. Although the instance is of a repeal of a covenant by the effect of an act of parliament, which is permanent, yet the principle is fairly deducible from it, that if the act interdicted is only temporarily unlawful, it suspends the operation of the covenant. *Cohen v. N. Y. Mut. Life Ins. Co.*, 50 N. Y. 610, 10 Am. Rep. 522.

It must be considered in analogy to the marine insurance cases that there is engrafted by necessary force of the law upon the policy, a proviso or exception, saving it from forfeiture or extinction by suspending the payment of the premium, when by an unexpected condition of affairs it has become temporarily unlawful to make it. The contingency of a civil war could not by any possibility have been anticipated at the making of the policy, and it would be grossly unjust to allow a forfeiture, when by suspending the payment the contract could afterwards be substantially performed. The law, in my judgment, will save the policy from so disastrous a result. The basis of all the argument against this view, so far as adjudication is concerned, is the case of *Paradine v. Jane*, Aleyn, 26. The comments of the Chief Justice

upon it are forcible. It was a case of hardship only, not of impossibility of performance. The exact language of the report cannot fairly be construed against the principle now insisted on. It is as follows: "And this difference was taken, that where the law creates a duty or charge and the party is disabled to perform it without any default in him and hath no remedy over, there the law will excuse him. As in the case of waste, if a house be destroyed by tempest or by enemies, the lessee is excused. So of an escape. So in 9 E. III, 16, a supersedeas was awarded to the justices, that they should not proceed in a cessavit upon a cesser during the war, but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning or thrown down by enemies, yet he ought to repair it." The point of the second proposition is, "if he may." He must, if possible, however hard. The impossibilities recognized by the law are impossibility by act or force of law and impossibility by the act of God. It is unnecessary in this case to deal with the latter excuse, as there is more difficulty about it, but as to the former, it is said in *Chitty on Contracts*, 804, "that the non-performance of a contract will always be excused where it is occasioned by act of law or by an act done by public authority." The doctrine already considered, would apply to a case where the disability was only on the part of the party to perform, but in the case before us, the company could not receive the payment without a violation of the law on their part. To do so would necessitate an act of intercourse. Hence both parties were under a legal disability—one to pay, the other to receive. This is the effect of the act of congress and of the state of war. The right of those interested in the policy to pay and save the insurance was just as strong as the right of the company to receive. Neither could enjoy the right. By what principle, then, can the company exact a strict compliance with the clause to pay at a definite time? The hands of each were tied, and the company could not complain of the other's default. According to all analogy and principles, the performance must be suspended under such circumstances. To dissolve, when the contract is part executed, would not place the parties in a just position; but to suspend will best reach the intention and spirit of the contract.

The suggestion that this being a mutual company the contract is therefore like a partnership and dissolved, is disposed of by what Allen, J., said in substance in *Cohen v. N. Y. Mutual Life Insurance Co.*, 50 N. Y. 624, 10 Am. Rep. 522, that the company is a body corporate, capable of contracting as such, and the relation is between insurer, a corporation, and insured; that the members are not partners between themselves. The contract is the contract of the corporation, and whatever incidental advantages appertain to a member, that that does not affect the contract in the policy. Besides, if a partnership, it would result in an accounting as of the time of dissolution, which would be at the commencement of the war, and the defendant would hardly desire that result.

The further suggestion by defendant's counsel that the fault of non-payment must be imputed to the plaintiffs, because the rebellion was their fault, cannot be regarded. The law deals with the condition of things when actual hostilities exist, and considers all the citizens of the belligerent districts as enemies mutually. The causes of the contest are swallowed up in the strife, and the legal results of it, between individuals, are not affected by the causes which induced it. If this insurance company had been located south and the plaintiffs north, the law would affect them the same as it does now with their present status.

The questions involved in this cause have greatly agitated the courts of this country, and resulted in adverse decisions. I have not reviewed them, but will content myself with merely a reference to them, both in favor of the result reached and those adverse. In favor: *N. Y. Life Ins. Co. v. Clopton*, 7 Bush (Ky.) 179, 3 Am. Rep. 290; *Manhattan Life Ins. Co. v. Warwick*, 20 Grat. (Va.) 614, 3 Am. Rep. 218; *Robinson v. Internat. Life Assurance Co.*, 42 N. Y. 54, 1 Am. Rep. 400; *Statham v. N. Y. Life Ins. Co.*, 45 Miss. 581, 7 Am. Rep. 737; *Hamilton v. Mutual Life Ins. Co.*, 9 Blatchf. 234, Fed. Cas. No. 5,986; *Cohen v. N. Y. Mutual Life Ins. Co.*, 50 N. Y. 610, 10 Am. Rep. 522; *Sands v. N. Y. Life Ins. Co.*, 50 N. Y. 626, 10 Am. Rep. 535. Adverse: *Dillard v. Manhattan Life Ins. Co.*, 44 Ga. 119, 9 Am. Rep. 157; *O'Reily v. Mutual Life Ins. Co.*, 2 Abb. Prac. (N. S. N. Y.) 167; also *Tait v. N. Y. Life Ins. Co.*, in U. S. Circuit, Western Tennessee (1873) Fed. Cas. No. 13,726.

In addition to these cases, the recent action of the Supreme Court of the United States, in affirming, by a divided court, two adverse judgments, exhausts all the adjudication I can find upon the distinct subject.

The objection that the suit is not brought in the name of the proper party, is correctly disposed of by the Chief Justice, and nothing further need be said upon it.

The judgment of the Supreme Court must be affirmed.

The CHANCELLOR dissenting.

4. MAYO & JONES v. CARTWRIGHT.

(Supreme Court of Arkansas, 1875. 30 Ark. 407.)

Appeal from Monroe Circuit Court in Chancery.

WALKER, J. This is a suit in chancery, brought in the Monroe Circuit Court by Cartwright against Mayo and Jones, to enjoin the sale of a tract of land, bought by Cartwright of George Washington, who had, before that time, conveyed the same in trust to Mayo, one of the defendants, to secure the payment of certain notes, which Washington owed to one Loftus, and for the payment of which Mayo and Jones were bound as the securities of Washington. The case was heard upon bills, answers, exhibits and depositions, upon consideration of which the court decreed that Mayo, the trustee, be perpetually enjoined from executing his trust, and for costs.

From this decree Mayo and Jones have appealed to this court.

The main ground for equitable relief set up in this bill was the uninterrupted adverse possession of the complainant for more than seven years, which he sets up as a bar to the sale of the land by the trustee under the trust deed.

The defendants in their answer admit the purchase and possession of the land by complainant, but deny that their right to enforce the trust is barred by limitation, upon the ground, amongst others, that the statute bar was suspended during the late war, and deducting that time, seven years had not elapsed between the time the adverse possession commenced and the time when the trustee attempted to enforce his trust.

After a careful consideration of the several allegations of complaint, the admissions of the answers, and the evidence, the facts of the case are that Washington and Baldwin, with Jones and Mayo as their security, on the _____ of October, 1850, executed to Loftus two notes under seal for \$1500 each, one payable 1st February, 1853, the other payable 1st February, 1854. To secure the payment of these notes, Washington, the owner and occupant of a tract of land in Monroe county, Ark., on the 8th of April, 1856, executed a deed of trust to Mayo, one of his securities on the notes to Loftus, with power to sell the land upon notice to satisfy the debts; that the trust was accepted by Mayo, and the deed acknowledged and recorded in the recorder's office of that county on the 10th April, 1856, two days after its execution; that Washington continued in possession of the land, cultivated the same, and appropriated the rents and profits to his own use, up to the time of his sale of the land to Cartwright.

That Cartwright, a non-resident of the State, made a verbal contract with Washington for the purchase of the land, under which Murrel, his son-in-law, as his agent, took possession in December, 1857. That Washington, for the consideration of \$21,000, which was paid to him on the 1st of January, 1858, executed to Cartwright a deed with covenants of warranty of title, after which Cartwright's possession was continuous and uninterrupted until the commencement of this suit, on the 17th December, 1868 (except a temporary absence during part of the time of the late war). That during all of the time after he entered upon the lands, he cultivated the same, and received and appropriated the rents and profits to himself; that he paid the taxes on the land as his, and made notorious and valuable improvements on it, such as clearing, fencing, building and ditching; that during all this time (except a temporary absence during the war) Mayo resided in the neighborhood of the land; that he did not apprise Cartwright of his title or claim as trustee, nor assert any claim or control over the lands, or the rents and profits, until the 31st of October, 1868, at which time he advertised the lands for sale.

Upon this state of case Cartwright contends, first, that he was an innocent purchaser for a valuable consideration, and that Mayo is estopped, by silence and acquiescence in the purchase, payment, occupancy and improvements upon the land from setting up or asserting his claim as trustee; and, second, that Mayo is barred by lapse of time from asserting his claim to the land as trustee.

As regards the first position, we must hold that although there ap-

pears to have been no actual notice of the trust claim, and that Cartwright, a stranger in the country, finding Washington in possession of the land, with evidence of title in himself, in good faith made the purchase, and paid his money in ignorance of the existence of the trust deed; still, as the deed was of record, he is chargeable with constructive notice, and Mayo was not bound to warn him of his title. It was the carelessness and neglect of Cartwright, in not examining the records to see whether there was or not an incumbrance upon his title, the consequences of which he must bear.

The second ground assumed for complaint, presents the only serious question to be determined.

The defendants insist that they are not barred by the statute from enforcing their claim under the trust deed: First—Because Cartwright has not had seven years' peaceable, continuous, possession of the land, adverse to the rights of defendant. And Second—That by reason of several payments made upon the notes to secure the payment of which the deed was executed, the debts are not barred by limitation, and that whilst the debt remains due and unsatisfied, the right to enforce payment under the deed exists.

Under the first ground of defense, as to the seven years' proposition, the statute is as follows:

Sec. 2, Gould's Digest, ch. 106: "No person or persons, or their heirs, shall sue, or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments, but within seven years next after his, her, or their right to commence, have, or maintain such suit, shall have come, fallen, or accrued; and that suits, either in law or equity, for the recovery of any lands, tenements or hereditaments, shall be had, and sued, within seven years next after title, or cause of action accrued, and at no time after said seven years shall have expired. Excepting minors, femmes covert, and persons non compos mentis."

These are the only exceptions made by the statute, nor is there anything in the language of the statute, from which, by any fair construction, any other exceptions may be inferred.

Cartwright went into possession on the 1st of January, 1858, under his purchase, and from that time until the 31st October, 1868, a period of ten years and ten months, continued in peaceable, adverse, uninterrupted possession.

To avoid the effect of this, the defendants claim that the statute bar did not run during the time between the proclamation of war by President Lincoln, on the 27th of April, 1861, and that of President Johnson at the close of the late war, on the 2d of April, 1866, and that deducting this time from the ten years and ten months, the seven years had not expired on the 31st October, 1868. We have seen that the statute makes no such exception, and in the case of *Bennett v. Worthington*, 24 Ark. 487, we held that when the statute made no exception we could make none. But in a later decision of this court, *Metropolitan Bank v. Gordon*, 28 Ark. 115, the case of *Bennett v. Worthington* was overruled, upon the authority of *Hanger v. Abbott*, 6 Wall. 532, 18 L. Ed. 939; *Levy v. Stewart*, 11 Wall. 244, 20 L. Ed. 86; *Stewart v. Kahn*, 11 Wall. 493, 20 L. Ed. 176; and *United States v. Singer*, 15 Wall. 111, 21 L. Ed. 49. In none of these decisions is there

a single authority cited to sustain them. They are distinctly placed upon the ground that intercourse was prohibited between the belligerent States in time of civil war, and that as between belligerents the international laws of war should prevail. In all of these cases, the suits, except that of *United States v. Wiley*, 11 Wall. 508, 20 L. Ed. 211, and *Levy v. Stewart*, 11 Wall. 244, 20 L. Ed. 86, were between the loyal States of the one party and the rebel States of the other, and fixed as the period of the statute bar the dates of the proclamations declaring war and that of its suspension. The ground upon which the Supreme Court of the United States extended this suspension to suits between the citizens of the rebel States was based upon an act of Congress. Since the decision of the case of the *Metropolitan Bank v. Gordon*, this court has applied the rule as held in that case to several cases between the citizens of this State, limiting the period of suspension, however, to the 6th May, 1861, the date of the secession ordinance, and the close of the war April 2d, 1866.

These decisions have been so long made and acquiesced in, that we do not feel at liberty to disturb them. Nor have we made this reference to them for that purpose, but to show the true grounds upon which they rest, and that they should not be relied upon as authority for making a like exception in favor of a trustee, with power to sell upon notice. The act to be performed was personal, neither the existence nor the intervention of a court was necessary, to enable the trustee to execute his trust.

It is no doubt true that there was a time during the war, when it would have been an abuse of the trust to have exposed the property to sale, and perhaps hazardous to the trustee personally to have attempted to do so. If we should attempt to go this step further, and engraft upon the statute this, as an additional exception to the operation of the statute, it may with equal propriety be extended to all other personal trusts.

Mayo, the trustee, had ample time, both before and after the war, to execute this trust. He could have done so at his pleasure, or if Jones, who seems to have been interested in the execution of the trust, had desired that it should be executed, he could have compelled Mayo to do so or to resign.

We have already gone as far, under the sanction of the decisions of the Supreme Court of the United States, as we feel authorized to go, and particularly when the circumstances which induced the courts to make this exception, do but partially, if at all, exist in this case, and must hold that in this case the statute bar was not suspended by reason of the rebellion; and as no steps were taken by the trustee to assert his rights to the land for more than ten years, during all which time the complainant held continued, peaceable and adverse possession of the land, had made lasting and valuable improvements upon it, and cultivated it, and appropriated the profits of the cultivation to his own use, that the statute bar was complete. * * *

Holding, as we must, that the statute bar is complete, the decree of the court below must be in all things affirmed.

5. NEW YORK INS. CO. v. STATHAM.

(Supreme Court of the United States, 1876. 93 U. S. 24, 23 L. Ed. 789.)

The first of these cases is here on appeal from, and the second and third on writs of error to, the Circuit Court of the United States for the Southern District of Mississippi.

The first case is a bill in equity, filed to recover the amount of a policy of life assurance, granted by the defendant (now appellant) in 1851, on the life of Dr. A. D. Statham, of Mississippi, from the proceeds of certain funds belonging to the defendant attached in the hands of its agent at Jackson, in that State. It appears from the statements of the bill that the annual premiums accruing on the policy were all regularly paid, until the breaking out of the late civil war, but that, in consequence of that event, the premium due on the 8th of December, 1861, was not paid; the parties assured being residents of Mississippi, and the defendant a corporation of New York. Dr. Statham died in July, 1862.

The second case is an action at law against the same defendant to recover the amount of a policy issued in 1859 on the life of Henry S. Seyms, the husband of the plaintiff. In this case, also, the premiums had been paid until the breaking out of the war, when, by reason thereof, they ceased to be paid, the plaintiff and her husband being residents of Mississippi. He died in May, 1862.

The third case is a similar action against the Manhattan Life Insurance Company of New York, to recover the amount of a policy issued by it in 1858, on the life of C. L. Buck, of Vicksburg, Miss.; the circumstances being substantially the same as in the other cases.

Each policy is in the usual form of such an instrument, declaring that the company, in consideration of a certain specified sum to it in hand paid by the assured, and of an annual premium of the same amount to be paid on the same day and month in every year during the continuance of the policy, did assure the life of the party named, in a specified amount, for the term of his natural life. Each contained various conditions, upon the breach of which it was to be null and void; and amongst others the following: "That in case the said assured shall not pay the said premium on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or in any part thereof, and this policy shall cease and determine." The Manhattan policy contained the additional provision, that, in every case where the policy should cease or become null and void, all previous payments made thereon should be forfeited to the company.

The non-payment of the premiums in arrear was set up in bar of the actions; and the plaintiffs respectively relied on the existence of the war as an excuse, offering to deduct the premiums in arrear from the amounts of the policies.

The decree and judgments below were against the defendants.

Mr. Justice BRADLEY, after stating the case, delivered the opinion of the court.

We agree with the court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year,—as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten or twenty annual instalments. Such instalments are clearly not intended as the consideration for the respective years in which they are paid; for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the whole life. The value of assurance for one year of a man's life when he is young, strong, and healthy, is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance.

But whilst this is true, it must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for nonpayment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for out of the coexistence of many risks arises the law of average, which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality, and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company. This has always been the understanding and the practice in this department of business. Some companies, it is true, accord a grace of thirty days, or other fixed period, within which the premium in arrear may be paid, on certain conditions of continued good health, &c. But this is a matter of stipulation, or of discretion, on the part of the

particular company. When no stipulation exists, it is the general understanding that time is material, and that the forfeiture is absolute if the premium is not paid. The extraordinary and even desperate efforts sometimes made, when an insured person is in extremis, to meet a premium coming due, demonstrates the common view of this matter.

The case, therefore, is one in which time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence.

But the court below bases its decision on the assumption that, when performance of the condition becomes illegal in consequence of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war, and to have revived with all its force when the war ended. Such a suspension and revival do take place in the case of ordinary debts. But have they ever been known to take place in the case of executory contracts in which time is material? If a Texas merchant had contracted to furnish some Northern explorer a thousand cans of preserved meat by a certain day, so as to be ready for his departure for the North Pole, and was prevented from furnishing it by the civil war, would the contract still be good at the close of the war five years afterwards, and after the return of the expedition? If the proprietor of a Tennessee quarry had agreed in 1860, to furnish, during the two following years, ten thousand cubic feet of marble, for the construction of a building in Cincinnati, could he have claimed to perform the contract in 1865, on the ground that the war prevented an earlier performance?

The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive.

In the case of life insurance, besides the materiality of time in the performance of the contract, another strong reason exists why the policy should not be revived. The parties do not stand on equal ground in reference to such a revival. It would operate most unjustly against the company. The business of insurance is founded on the law of averages; that of life insurance eminently so. The average rate of mortality is the basis on which it rests. By spreading their risks over a large number of cases, the companies calculate on this average with reasonable certainty and safety. Any thing that interferes with it deranges the security of the business. If every policy lapsed by reason of the war should be revived, and all the back premiums should be paid, the companies would have the benefit of this average amount of risk. But the good risks are never heard from; only the bad are sought to be revived, where the person insured is either dead or dying. Those in health can get new policies cheaper than to pay arrearages on the old. To enforce a revival of the bad cases, whilst the company necessarily lose the cases which are desirable, would be mani-

festly unjust. An insured person, as before stated, does not stand isolated and alone. His case is connected with and correlated to the cases of all others insured by the same company. The nature of the business, as a whole, must be looked at to understand the general equities of the parties.

We are of the opinion, therefore, that an action cannot be maintained for the amount assured on a policy of life insurance forfeited, like those in question, by non-payment of the premium, even though the payment was prevented by the existence of the war.

The question then arises, Must the insured lose all the money which has been paid for premiums on their respective policies? If they must, they will sustain an equal injustice to that which the companies would sustain by reviving the policies. At the very first blush, it seems manifest that justice requires that they should have some compensation or return for the money already paid, otherwise, the companies would be the gainers from their loss; and that from a cause for which neither party is to blame. The case may be illustrated thus: Suppose an inhabitant of Georgia had bargained for a house, situated in a Northern city, to be paid for by instalments, and no title to be made until all the instalments were paid, with a condition that, on the failure to pay any of the instalments when due, the contract should be at an end, and the previous payments forfeited; and suppose that this condition was declared by the parties to be absolute and the time of payment material. Now, if some of the instalments were paid before the war, and others accruing during the war were not paid, the contract, as an executory one, was at an end. If the necessities of the vendor obliged him to avail himself of the condition and to resell the property to another party, would it be just for him to retain the money he had received? Perhaps it might be just if the failure to pay had been voluntary, or could, by possibility, have been avoided. But it was caused by an event beyond the control of either party,—an event which made it unlawful to pay. In such case, whilst it would be unjust, after the war, to enforce the contract as an executory one against the vendor, contrary to his will, it would be equally unjust in him, treating it as ended, to insist upon the forfeiture of the money already paid on it. An equitable right to some compensation or return for previous payments would clearly result from the circumstances of the case. The money paid by the purchaser, subject to the value of any possession which he may have enjoyed, should, *ex æquo et bono*, be returned to him. This would clearly be demanded by justice and right.

And so, in the present case, whilst the insurance company has a right to insist on the materiality of time in the condition of payment of premiums, and to hold the contract ended by reason of non-payment, they cannot with any fairness insist upon the condition, as it regards the forfeiture of the premiums already paid; that would be clearly unjust and inequitable. The insured has an equitable right to have this amount restored to him, subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence; in other words, he is fairly entitled to have the equitable value of his policy.

As before suggested, the annual premiums are not the consideration of assurance for the year in which they are severally paid, for they are equal in amount; whereas, the risk in the early years of life is much less than in the later. It is common knowledge, that the annual premiums are increased with the age of the person applying for insurance. According to the approved tables, a person becoming insured at twenty-five is charged about twenty dollars annual premium on a policy of one thousand dollars, whilst a person at forty-five is charged about thirty-eight dollars. It is evident, therefore, that, when the younger person arrives at forty-five, his policy has become, by reason of his previous payments, of considerable value. Instead of having to pay, for the balance of his life, thirty-eight dollars per annum, as he would if he took out a new policy on which nothing had been paid, he has only to pay twenty dollars. The difference (eighteen dollars per annum during his life) is called the equitable value of his policy. The present value of the assurance on his life exceeds by this amount what he has yet to pay. Indeed, the company, if well managed, has laid aside and invested a reserve fund equal to this equitable value, to be appropriated to the payment of his policy when it falls due. This reserve fund has grown out of the premiums already paid. It belongs, in one sense, to the insured who has paid them, somewhat as a deposit in a savings-bank is said to belong to the person who made the deposit. Indeed, some life-insurance companies have a standing regulation by which they agree to pay to any person insured the equitable value of his policy whenever he wishes it; in other words, it is due on demand. But whether thus demandable or not, the policy has a real value corresponding to it,—a value on which the holder often realizes money by borrowing. The careful capitalist does not fail to see that the present value of the amount assured exceeds the present value of the annuity or annual premium yet to be paid by the assured party. The present value of the amount assured is exactly represented by the annuity which would have to be paid on a new policy; or, thirty-eight dollars per annum in the case supposed, where the party is forty-five years old; whilst the present value of the premiums yet to be paid on a policy taken by the same person at twenty-five is but little more than half that amount. To forfeit this excess, which fairly belongs to the assured, and is fairly due from the company, and which the latter actually has in its coffers, and to do this for a cause beyond individual control, would be rank injustice. It would be taking away from the assured that which had already become substantially his property. It would be contrary to the maxim, that no one should be made rich by making another poor.

We are of the opinion, therefore, first, that as the companies elected to insist upon the condition in these cases, the policies in question must be regarded as extinguished by the non-payment of the premiums, though caused by the existence of the war, and that an action will not lie for the amount insured thereon.

Secondly, that such failure being caused by a public war, without the fault of the assured, they are entitled *ex æquo et bono* to recover the equitable value of the policies with interest from the close of the war.

It results from these conclusions that the several judgments and the decree in the cases before us, being in favor of the plaintiffs for the whole sum assured, must be reversed, and the records remanded for further proceedings. We perceive that the declarations in the actions at law contain no common or other counts applicable to the kind of relief which, according to our decision, the plaintiffs are entitled to demand; but as the question is one of first impression, in which the parties were necessarily somewhat in the dark with regard to their precise rights and remedies, we think it fair and just that they should be allowed to amend their pleadings. In the equitable suit, perhaps, the prayer for alternative relief might be sufficient to sustain a proper decree; but, nevertheless, the complainants should be allowed to amend their bill, if they shall be so advised.

In estimating the equitable value of a policy, no deduction should be made from the precise amount which the calculations give, as is sometimes done where policies are voluntarily surrendered, for the purpose of discouraging such surrenders; and the value should be taken as of the day when the first default occurred in the payment of the premium by which the policy became forfeited. In each case the rates of mortality and interest used in the tables of the company will form the basis of the calculation.

The decree in the equity suit and the judgments in the actions at law are reversed, and the causes respectively remanded to be proceeded with according to law and the directions of this opinion.

Mr. Chief Justice WAITE. I agree with the majority of the court in the opinion that the decree and judgments in these cases should be reversed, and that the failure to pay the annual premiums as they matured put an end to the policies, notwithstanding the default was occasioned by the war; but I do not think that a default, even under such circumstances, raises an implied promise by the company to pay the assured what his policy was equitably worth at the time. I therefore dissent from that part of the judgment just announced which remands the causes for trial upon such a promise.

Mr. Justice STRONG. While I concur in a reversal of these judgments and the decree, I dissent entirely from the opinion filed by a majority of the court. I cannot construe the policies as the majority have construed them. A policy of life insurance is a peculiar thing. Its obligations are unilateral. It contains no undertaking of the assured to pay premiums: it merely gives him an option to pay or not, and thus to continue the obligation of the insurers, or terminate it at his pleasure. It follows that the consideration for the assumption of the insurers can in no sense be considered an annuity consisting of the annual premiums. In my opinion, the true meaning of the contract is, that the applicant for insurance, by paying the first premium, obtains an insurance for one year, together with a right to have the insurance continued from year to year during his life, on payment of the same annual premium, if paid in advance. Whether he will avail himself of the refusal of the insurers, or not, is optional with him. The payment *ad diem* of the second or any subsequent premium is, therefore, a condition precedent to continued liability of the insurers. The assured may perform it or not, at his option. In such

a case, the doctrine that accident, inevitable necessity, or the act of God, may excuse performance has no existence. It is for this reason that I think the policies upon which these suits were brought were not in force after the assured ceased to pay premiums. And so, though for other reasons, the majority of the court holds; but they hold, at the same time, that the assured in each case is entitled to recover the surrender, or what they call the equitable, value of the policy. This is incomprehensible to me. I think it has never before been decided that the surrender value of a policy can be recovered by an assured, unless there has been an agreement between the parties for a surrender; and certainly it has not before been decided that a supervening state of war makes a contract between private parties, or raises an implication of one.

Mr. Justice CLIFFORD, with whom concurred Mr. Justice HUNT, dissenting.

Where the parties to an executory money-contract live in different countries, and the governments of those countries become involved in public war with each other, the contract between such parties is suspended during the existence of the war, and revives when peace ensues; and that rule, in my judgment, is as applicable to the contract of life insurance as to any other executory contract. Consequently, I am obliged to dissent from the opinion and judgment of the court in these cases.

6. HORLOCK v. BEAL.

(House of Lords. [1916] 1 App. Cas. 486.)

A British ship during a voyage for which a British seaman had signed articles, being in a German port when war was declared between the United Kingdom and the German Empire, was immediately detained, and some months later the crew were imprisoned. The ship was still detained and the crew imprisoned when this action for an allotment of wages was commenced. * * *

Earl LOREBURN. My Lords, this is a case of great importance at the present time. A seaman had the misfortune to be serving on a British ship which entered the port of Hamburg on August 2, 1914. The ship was detained by the German authorities when on August 4 war broke out.

Ever since that date the ship and the crew have been detained in Germany. We do not know whether the ship has been condemned or not, but we know that she has been kept and her crew imprisoned. From August 4 till November 2 they were kept as prisoners on their own ship, and on November 2 were removed to other places of confinement.

In these circumstances this seaman's wife sues on an allotment note. Her right to recover admittedly depends on the question, Was the seaman entitled to his wages for the period from August 2 to April 10, 1915? His contract of service required him to serve on the ship *Coralie Horlock* for a voyage not exceeding two years in

duration. These articles were signed on May 21, 1914. An allotment note was issued in favour of the present plaintiff for a monthly payment of £4. 15s.

In my view the first question to be decided is whether or not, and at what date, the performance of this contract of service became impossible, which means impracticable in a commercial sense. It was at first possible that she might be released in accordance with a practice which has been common in former wars and is recommended, though not required, by the Hague Convention.

But the removal of the crew from their ship and their imprisonment elsewhere, and the lapse of time, made it clear that whatever hope there may have been of restoration could no longer be entertained. Looking back upon what happened, we may think that there never was any hope. Or we may think that there was a period of suspense during which it was not determined whether there should be, in accordance with common practice, a release on both sides of ships so situated. There is hardly anything to help us, except the fact that the men were detained on their own ship till November 2. On the whole it seems to me that there was a period of suspense, and, judging as best I can, I take November 2 as the date. It is a surmise, but the opposite view also is a surmise on what is a question of fact.

Assuming this to be so, does that impossibility of performance dissolve the contract of service and disentitle the seaman to wage from that time onwards? The law, both as it is found in the statute book and as it has been administered in Admiralty Courts, has always been in some respects peculiarly tender and benevolent towards seamen in regard to their contracts of service, though in earlier days with a notable exception embodied in the maxim that freight is the mother of wages. That was a cruel exception, which has been removed now by Act of Parliament. Yet it has always to be remembered in scrutinizing the older decisions, because what prevented freight from being earned might prevent wages from being recoverable.

Is there, then, either in any Act of Parliament or in admiralty law, any rule which prescribes the effect of such a detention by the enemy as makes the performance of a contract of service impossible? There is no proof of condemnation by a Court.

We were referred to section 158 of the Merchant Shipping Act. That section tells us what is to be done in regard to wages if there is a wreck or loss of the ship. In my opinion these words refer to physical loss. It is true that a ship is lost to her owner in a real sense when she has been captured and condemned by a competent Court. It was argued that she may be actually lost to her owner by a prolonged detention. But if I am right in thinking that both the words used in this section, namely, "wreck" and "loss," refer to the ship herself and to her physical condition, then they have no bearing on this case. I will merely add that the Court of Appeal in *The Olympic*, [1913] P. 92, did not decide anything inconsistent with this view. They merely used the frustration of the voyage as a test by which to

determine whether or not the physical injury inflicted amounted to "wreck."

Coming to the law as administered in admiralty, three cases were cited with a view of showing that prolonged detention of a ship and its crew by a foreign Power did not dissolve a seaman's contract of service. Two of these authorities are in 4 East, namely, *Beale v. Thompson*, 4 East, 546, 1 Dow, 299, and *Pratt v. Cuff*, 4 East, 43, the former of which was affirmed in this House more than a hundred years ago, but there is no record to show on what grounds. The third is a case at nisi prius, *Delamainer v. Winteringham*, 4 Camp. 186. They are cases in which ships and crews were confined for a long time but were ultimately released, and the interrupted voyage completed so as to earn freight and therefore wages. It was held that wages continued to be payable throughout. This could be supported, and was supported in the judgments, on the ground that both employers and employed treated the service as not terminated by the temporary interruption, though there are passages in the judgments which admit of a broader interpretation. There is no distinct authority for the proposition that if a seaman is willing to fulfil his contract he is still entitled to wages, though the performance of it has been made impracticable on both sides by a prolonged captivity. Accordingly neither statute nor admiralty law provides special guidance, and I must recur to the common law. The contract was for service on a ship for a voyage within a period of two years. Both ship and crew were forcibly detained; the contemplated service became impracticable, so far as I can judge, on November 2, 1914. Had the ship and crew been released on November 2, I do not think common law would have treated the contract of service as ended, and I do not think the chance of her release was ended before November 2.

In my opinion, neither party was any longer bound by that contract from that date. If they were bound, it must mean that wages were to be paid, without any service in return, for the entire duration of this war, or, in the present case, till the expiry of two years from the commencement of the service. The Napoleonic war after the rupture of the Peace of Amiens lasted for eleven years. I think it was an implied term of this service, subject to any special law affecting seaman, that it should be practicable for the ship to sail on this voyage, in that sense which disregards minor interruptions and takes notice only of what substantially ends the possibility of the service contemplated being fulfilled. Both employer and employed made their bargain on the footing that, whatever temporary interruption might supervene, the ship and crew would be available to carry out the adventure.

Accordingly I think that the appeal should be allowed in respect of the period after November 2. I learned with satisfaction that provision is to be made for cases of this kind from public funds. It cannot, of course, affect the decision of a court of law, but it is in accordance with the spirit which has always influenced both courts of law and the Legislature in dealing with a deserving class of men. The shipowners in this case have brought it before the Courts in

order to settle the law, which has been in doubt, and are not open to any reflection. * * *

[Additional opinions were rendered by Lords ATKINSON, SHAW, PARMOOR and WRENBURY.]

7. TINGLEY v. MÜLLER.

(Court of Appeals. [1917] 2 Ch. 144.)

The defendant, a German by birth but for many years resident in England, although never naturalized, being about to proceed to Germany, executed a power of attorney on May 20, 1915, by which he appointed his solicitor his attorney to sell his leasehold house and to execute such transfers and deeds as were necessary. The power of attorney was made irrevocable for twelve months. On May 26 the defendant obtained a Government permit from the police to travel to Tilbury with the object of embarking for Germany by way of Flushing, and started on that day. On June 2, 1915, the leasehold premises were sold to the plaintiff by public auction, and a deposit was paid and an agreement signed by him. * * *

There was no evidence as to the date when the defendant reached Germany, but it was on some date between May 26 and June 11, 1915. At this latter date it appeared from letters received by his solicitors that he was then resident in Hamburg.

On the plaintiff learning from the answers to requisitions on title that the defendant was a German by birth, and then (as the plaintiff alleged) voluntarily resident in Germany, he refused to proceed with the contract of sale on the ground that it was a transaction prohibited by the Trading with the Enemy Acts, 1914, and at common law. He further claimed a return of the deposit of £100. and the costs of investigating the title.

The defendant by his defence pleaded that the sale was binding on the plaintiff, that he had been ordered by the British Government to leave England, and did not admit that at the date of the agreement he had been, or now was, voluntarily or otherwise resident in Germany, or an alien enemy. He expressed his willingness that the moneys payable to him under the agreement should be paid to and received by the Public Trustee as custodian under the Trading with the Enemy Acts, 1914 to 1916, or otherwise dealt with as the Court might direct. The defendant also thereby offered to consent to any order under the Trustee Act, 1893, or otherwise, vesting the premises in the plaintiff which might be necessary or advisable for the purpose of carrying the agreement into effect.

The action was tried before Eve, J., on January 17, 1917, who held that it failed and must be dismissed with costs. His Lordship said that on the facts he could not draw the inference desired by the plaintiff, and that his claim was quite misconceived. The plaintiff had not established the fact that the defendant was an alien enemy. The defendant was not an alien enemy merely by reason of his being a German by birth; it was necessary to prove that he was resident in Germany at the date of the agreement for sale. According to Por-

ter v. Freudenberg, [1915] 1 K. B. 857, the true test of a person being an alien enemy was the place where he resided or carried on business. It might be that the defendant could not claim specific performance of the agreement, but in the present proceedings the plaintiff had failed to discharge the onus of proof which was upon him.

The plaintiff appealed. The appeal was heard before the full Court of Appeal on March 23, 26, 1917. * * *

Lord COZENS-HARDY M. R. (after stating the facts). In these circumstances the purchaser claims the return of his deposit on several grounds. He contends that Müller was an alien enemy on June 2, and that therefore the contract was illegal. Eve, J., held that this fact had not been proved, and, this being the sole point raised before him, he dismissed the action. I cannot agree with this view. I think there is a presumption of fact that a man who left Tilbury on the evening of May 26 for Flushing reached Germany before June 2, and that in the absence of any other evidence a jury would be justified in finding that he did reach Germany before June 2. He was not an alien enemy while he was in England. He did not become such the moment he left our shores.

The meaning of "alien enemy" has from time to time varied. "Nationality" and "domicil" have both been treated as the critical test. The question was elaborately discussed in the full Court of Appeal in Porter v. Freudenberg, [1915] 1 K. B. 857, and it was held that neither domicil nor nationality is the true test. That decision is final so far as this Court is concerned. Residence in Germany, not merely crossing the German frontier from Holland, made him an alien enemy. Intention to reside is not sufficient. Residence implies a certain lapse of time. But, having regard to the abandonment of his British residence and to the fact that he was resident in Hamburg at least from August, if not earlier, I think it is right to hold that on June 2 Müller had become an alien enemy. The point taken before Eve J. cannot, in my opinion, be supported. This, however, by no means disposes of the case. (I only mention residence because there is no suggestion of carrying on business apart from residence.)

I attach great weight to the power of attorney of May 20. At that date it is beyond dispute that Müller was not an alien enemy. The authority conferred upon White was complete and irrevocable. No further "intercourse" with Müller was needed. White could not be interfered with in reference to the sale. White's position was, having regard to the provisions of the Conveyancing Acts, practically the same as if Müller had conveyed the property to White upon trust for sale. Lord Parker, in the passage to which I shall refer lower down, seems to me to assert that a trust for sale may be executed although the sole beneficiary is an alien enemy. The transaction is not a trading with the enemy within the mischief of the common law, or within the mischief of the Proclamation of September 9, 1914. Par. 3 adopts the rule in Porter v. Freudenberg, [1915] 1 K. B. 857, by stating it in a positive and also in a negative form. The expression "enemy" means any person resident or carrying on business in an enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. Par. 5 (1) applies only to a payment during the continu-

ance of the war. Par. 5 (9) has no application if, as I hold, the power of attorney was the only contract or obligation with or for the benefit of Müller.

But can it be said that the power of attorney was necessarily revoked when Müller became an alien enemy? I think not. It is true that most agencies, involving as they do continuous intercourse with an alien enemy, are revoked, or at least suspended. But such considerations have no bearing upon a special agency of this nature. Mr. Galbraith called our attention to a case decided in 1897 in the Supreme Court of the United States. *Williams v. Paine*, 169 U. S. 55, 18 Sup. Ct. 279, 42 L. Ed. 658. A power of attorney granted by an officer and his wife resident in Pennsylvania to convey land in the city of Washington was held not to be revoked by the war, in which the grantors of the power took an active part with the Confederates, but to be well executed notwithstanding the war.

It must not be forgotten that a contract for sale of land stands in a peculiar position. It is for many purposes to be regarded as an equitable conveyance. The objection taken by the purchaser is not really as to title, but only as to conveyance. Time was not of the essence of the contract. The legal estate if not got in by a deed, executed by Mr. White, as I think it might be, could probably be got in by an application under the Trustee Acts, and certainly by an application under the Trading with the Enemy Amendment Act, 1916, § 4. If an order were made under that section all difficulty would be removed.

The recent case in the House of Lords of *Daimler Co. v. Continental Tyre and Rubber Co. (Great Britain)*, [1916] 2 A. C. 307, is not a direct decision upon the points raised in the present case. But I have derived great assistance from the observations of Lord Parker, [1916] 2 A. C. 347. He points out: "I see no reason why a company should not trade merely because enemy shareholders may after the war become entitled to their proper share of the profits of such trading. I see no reason why the trustee of an English business with enemy *cestuis que trust* should not during the war continue to carry on the business although after the war the profits may go to persons who are now enemies, or why moneys belonging to an enemy but in the hands of a trustee in this country should not be paid into Court and invested in Government stock or other securities for the benefit of the persons entitled after the war. The contention appears to me to extend the principle on which trading with the enemy is forbidden far beyond what reason can approve or the law can warrant. In early days the King's prerogative probably extended to seizing enemy property on land as well as on sea. As to property on land, this prerogative has long fallen into disuse. Subject to any legislation to the contrary or anything to the contrary contained in the treaty of peace when peace comes, enemy property in this country will be restored to its owners after the war just as property in enemy countries belonging to His Majesty's subjects will or ought to be restored to them after the war. In the meantime it would be lamentable if the trade of this country were fettered, businesses shut down, or money allowed to remain idle in order to prevent any possible benefit accruing thereby to enemies after peace. The prohibition against doing

anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes."

The weight attributable to those observations is greatly increased by the circumstance that Lord Parker's judgment was formally approved of and concurred in by Lord Mersey, Lord Kinnear and Lord Sumner.

The result is that in my opinion the plaintiff is not entitled to demand a return of his deposit, and the appeal fails.

[Concurring opinions were delivered by SWINFEN, EADY, BANKS, WARRINGTON and BRAY, JJ. A dissenting opinion was delivered by SCRUTTON, J.]

8. THE KRONPRINZESSIN CECILIE.

NORTH GERMAN LLOYD v. GUARANTY TRUST CO.

(Circuit Court of Appeals of the United States, First Circuit, 1916. 238 Fed. 668, 151 C. C. A. 518.)

Appeals from the District Court of the United States for the District of Massachusetts; Clarence Hale, Judge.

Libel by the Guaranty Trust Company of New York against the steamship Kronprinzessin Cecilie, claimed by the North German Lloyd, together with libels by Charles W. Rantoul, Jr., by Maurice Hanssens, and by the National City Bank of New York against the same vessel. From a decree dismissing the libels (228 Fed. 946), libelants appeal. Reversed as to the libel by the Guaranty Trust Company of New York and National City Bank of New York, and affirmed as to the libels of Charles W. Rantoul, Jr., and Maurice Hanssens.

DODGE, Circuit Judge. The careful and detailed statement of the material facts involved in these cases which is found in the opinion of the District Court (228 Fed. 946) will render direct reference unnecessary to the evidence in the record, except in a few instances. As to the facts there is little or no controversy.

1. From Bremen, the home port of this German steamship and her ultimate port of destination on the voyage here in question, her owner, a German corporation, sent a wireless message to her master on July 31, 1914, at 2:45 p. m. This message he received on board the ship, at sea, at 10 p. m., on the same day, by the ship's time—11:45 p. m. by Greenwich time. The message consisted of the peremptory order, "Turn back to New York," prefaced by the statement, "War has broken out with England, France, Russia." This statement meant, as is not disputed, and it was understood by the master to mean, that war had actually broken out between Germany and each of the other countries named. Neither at the time it was sent nor at the time it was received was the statement true as to either of said countries. Not only had no war been declared between Germany and any of them, but no actual state of war existed between Germany and any one of them. It was not until midnight on the same day that Germany notified Russia that she would mobil-

ize unless Russia demobilized within 12 hours, and not until 7 p. m. on the next day that war between Germany and Russia was declared; nor did that declaration make it certain that France or England would be involved.

When the master received the above message, his ship had considerably more than half completed her voyage from New York towards Plymouth in England and thence to Cherbourg in France, the ports at which delivery of the specie shipments on board her had been undertaken according to the bills of lading given for them at New York on July 27. She was a little more than 1,000 miles from Plymouth, the nearer of the two. The message was sent and received in a form such as prevented its above meaning from becoming known to any one but the master, and permitted such meaning to be ascertained by him only through the use of means long before carefully prepared, to be availed of in case the emergency indicated should occur, and kept on board the ship under seal for two years, the seal to be broken by the master only in case he received a message of the character given this message in its untranslated form.

The master obeyed the order to turn back instantly, before revealing the substance of the message to any other person on board. Nine minutes after its receipt the ship was headed for New York, instead of for Plymouth, and the voyage undertaken by the bills of lading had been abandoned. Not until after this had been done did the master inform the subordinate officers and the cabin passengers that he had done it.

A master is ordinarily the owners' representative for the purpose of effecting the safe carriage and delivery undertaken by the ship, and as such a stranger to the cargo. But circumstances of unexpected emergency may without doubt occur during a voyage, such as will change his ordinary relations towards ship and cargo, and, because a discretion must needs be exercised in order to avert or minimize extraordinary peril, threatening all the interests concerned, will make him, for the purpose of exercising it, the common representative of said interests alike. Though a measure adopted by him in the exercise of a discretion so required of him would otherwise be in violation of pending contracts of affreightment, the consent of all concerned will be implied from the fact that in adopting it he has acted as the representative as much of one interest as of any other, and neither will have the right to complain of it as a breach of contract. In the opinion of the District Court the turning back of this ship as above was a discretionary measure taken by the master under circumstances of the kind above referred to, and therefore leaving the owners of these three shipments of specie no right to complain of it as a breach of the contract to deliver their specie at Plymouth or Cherbourg.

The owner of the ship had the burden of proving circumstances actually existing at the time, sufficient to justify such an exercise of discretion on the master's part, present to his mind when he turned back, and also an actual exercise of such discretion by him in view thereof. I have been unable to agree with the finding below that

ground for apprehending actual arrest or restraint unless she so returned, such as the law of carriage by sea recognizes as the equivalent of actual arrest or restraint. The question is whether or not the requisite proof has been made in this case.

It may be taken for granted that when it has become plainly obvious that continuance of the voyage must necessarily involve arrest or restraint, and can have no other result, such departure from the voyage as is necessary to avoid the danger is not only permissible, but is required of the vessel. She must do what is needful for the purpose of avoiding any actual and presently imminent danger, instead of adhering to a course which can only carry her directly into it. But the evidence here relied on, as will appear, is far from showing the existence of any such situation. What is relied on is, at most, the desirability of keeping the ship out of reach of a future, contingent danger.

The phrase here in question, or some substantial equivalent thereof, has long been familiar in charter parties, bills of lading, and policies of marine insurance. When "arrest and restraint," etc., is a risk assumed by a marine policy, there must be proof, in order to justify abandonment to the insurer and maintain thereupon a claim for constructive total loss, that arrest or restraint, etc., was the proximate cause of the abandonment and loss. The peril must operate upon the subject of insurance directly, not circuitously. If there has not in fact been actual arrest or restraint, etc., a loss because of apprehension thereof is not within the policy, unless the apprehension is shown to have been warranted by actual and immediate danger, apparently inevitable and morally certain. This may be regarded as settled by the decisions both in England and the United States, as is hardly disputed on the owner's behalf. Its contention is that a different rule of construction applies in cases arising upon bills of lading, and, in substance, that in such cases apprehension of capture or detention by a hostile power will excuse nondelivery under the exception here relied on, even though no such actual and immediate danger thereof existed, provided that the apprehension was on the whole reasonable.

This exception, like the others wherewith it is usually associated in such documents, is a term introduced into the contract by and for the benefit of the carrier, and therefore to be construed most strongly against the carrier, according to well-settled principles. If another of the exceptions commonly accompanying it, viz., "perils of the seas," means the same, except as regards negligence of the master and crew, in a bill of lading, as in a marine policy (*The G. R. Booth*, 171 U. S. 450, 459, 19 Sup. Ct. 9, 43 L. Ed. 234; *The Xantho*, L. R. 12 App. Cas. 503, 510, 517; *Hamilton v. Pandorf*, Id. 518, 526), it is not easy to find sufficient ground for assigning to the words in question, when used in a bill of lading, a meaning broader than that to which their recognized construction, when used in policies of insurance, confines them.

Other stipulations found in the same contract may of course enlarge the scope of the carrier's exemption from liability beyond that permitted by these words alone. But nothing of this kind is found

in these bills of lading. No charter party is here involved. The ship was a common carrier, and by the terms of the bills of lading the full common carrier's liability for delivery of the specie at the agreed ports had been assumed; qualified only, so far as this case is concerned, by the above exception. There was no stipulation that the agreed ports of delivery should be safe, nor any express reservation of any right to deal with the specie otherwise than as promised by the bills of lading if in the master's judgment they should become unsafe. There were stipulations of this kind in the contracts under consideration in the cases here most relied on by the shipowner, viz.: *The Styria*, 186 U. S. 1, 22 Sup. Ct. 731, 46 L. Ed. 1027; *Nobel's Explosives Co. v. Jenkins* [1896] L. R. 2 Q. B. 326; *The Teutonia*, L. R. 4 P. C. 171; *The Express*, L. R. 3 A. & E. 597. No sufficient warrant is found in them for the claim that the recognized construction in insurance cases is inapplicable to the exception relied on in the present case.

That the arrest or restraint which will excuse failure to make the delivery undertaken by a contract of affreightment unqualified, except as in these bills of lading, must be an actual and operative restraint, and that no merely expected and contingent restraint affords sufficient excuse, has been settled law at least since *Atkinson v. Ritchie*, 10 East, 530. If, as in that case, an embargo laid by the country of the port where the cargo was to be shipped is relied on, reasonable apprehension that such embargo will be laid does not excuse the carrier, when in fact it was not laid. If, as in *Brunner v. Webster*, 5 Com. Cas. 167, sanitary regulations forbidding discharge at the port of delivery are relied on, such regulations must have been in force at the probable time of delivery; a justifiable belief that they would be in force, if mistaken, will not be enough to bring the failure to deliver within the exception.

If, as was done in *Balfour et al. v. Portland, etc., Co.* (D. C.) 167 Fed. 1010, by the District Court in Oregon, the attending and existing circumstances at the time these contracts of affreightment were made be examined in order to determine the meaning presumably intended by both parties to be put upon this exception, no sufficient reason for making it include a merely apprehended danger of capture or detention not present or imminent can be found.

On July 31, 1914, when the owner abandoned the voyage, there was, no doubt, danger that an actual state of war would arise whose existence would make Plymouth and Cherbourg hostile ports as regarded the vessel. But this was not a danger arising after the voyage had begun; there was danger that just such a war would arise when the bills of lading were given, four days before, on July 27th. That this very danger was then present to the minds of both parties to these contracts of affreightment is not and could not be disputed. The ship was capable of being used as a vessel of war by the German government, and liable to be taken and used by it as such if within its actual control; a fact which made her more liable than an ordinary German merchant to arrest or capture by either England or France as soon as the apprehended state of war should exist. This fact also must, we think, be regarded as present to the minds of

both parties to the above contracts. Yet the owner of the vessel, with the above situation in view, understood delivery of the specie at Plymouth and Cherbourg, under contracts which reserved to it no right to abandon it, according to principles long settled and universally understood, insure delivery as agreed unless "arrest or restraint of princes," etc., should prevent. It appears that the specie might at the time have been shipped on British or French vessels from New York for the above ports, as to which said ports would not have become hostile in event of war, and that it was shipped on this German vessel in order to take advantage of her greater speed. I find nothing in any of these circumstances tending to warrant a construction of the exception under consideration in the shipowner's favor. Whether the danger of war would increase or diminish during the five or six days necessary to get the specie delivered according to the bills of lading, neither party can be said to have known; but the owner deliberately took the risk that the danger might increase, and cannot, therefore, in justice to the shippers, without proof that the only exception relied on operated to prevent delivery in the accepted meaning of its terms, be permitted to abandon the attempt to deliver without paying such damages as were thereby sustained.

An actual state of war, arising either before or after the voyage contracted for has begun, whereby ship or cargo are rendered liable to capture and condemnation, may justify abandonment of the voyage in order to avoid such capture, when reasonable grounds for apprehending such capture are shown. Delivery at a port of destination which such actual state of war has made a hostile port so far as the vessel is concerned, would in such a case be excused. The German Code, in articles 629, 634, a part of the law of the flag for the purposes of this case, has express provisions to this effect. Actual war, indeed, so coming into existence, makes it the ship's duty to her own sovereign not to enter a hostile port. *Atkinson v. Ritchie*, 10 East, 530, 533, 534; *British, etc. Co., v. Sanday, etc., Co.*, App. Cas. 1916, 650. But no case is found in which, there being no actual state of war, abandonment of a contract like this has been excused under the exception here relied on, because of mere apprehension that actual war might exist before delivery according to the contract could be made.

If, in the case of an actual state of war, arising after the voyage has begun, the ship or cargo might, under some circumstances, be put in immediate actual danger of capture from the moment in which the state of war became existent, so as to make it proper to say that reasonable ground for apprehending immediate war, was, for practical purposes, equally reasonable ground for apprehending immediate actual arrest or restraint by capture, no situation of this kind, sufficient to bring the owner's abandonment of the voyage within the exception relied on, seems to me proved in the present case.

Unless something had happened to delay the ship, such as is not shown to have ever happened on any of her numerous prior voyages to the same ports, the specie to be delivered at Plymouth would probably have been delivered there by 1 a. m. on August 3, 1914, and that for delivery at Cherbourg, by 8 a. m. on the same day. It is to

be noticed that the season of the year was that at which delay by weather conditions was least to be expected. The discharging facilities kept ready at both ports had enabled the ship, upon all but one of 13 trips to leave Plymouth within an hour from her arrival; and the same is true as to Cherbourg. Her longest stop at Plymouth had been 78 minutes; at Cherbourg, 66 minutes. Tenders controlled by her owner were regularly found awaiting her arrival, into which passengers, mails, and specie were discharged alongside. She did not go to a dock at either port. Plymouth did not become a hostile port, as regarded the steamship, until August 4th, at 11 p. m., when England declared war with Germany. Cherbourg did not become a hostile port until 6:45 p. m., on August 3rd, when Germany declared war with France. It is true that Germany had declared war with Russia at 7:10 p. m., on August 1st, at which time the ship would still have been 30 hours distant from Plymouth; but it can hardly be claimed that a state of war with Russia only exposed the ship to any immediate risk of capture. And after landing the Cherbourg specie as above, 11 hours before any war with France arose, another 23 hours run at her usual speed between those ports would have brought her to Bremen, her home port, by 7 a. m., on August 4th. The evidence shows no reason for apprehending detention at Cherbourg before 8 a. m., on August 3rd, nor until after 6:45 p. m., on that day. Nor is any reason shown for apprehending capture on the way from Plymouth to Cherbourg and thence to Bremen. English men-of-war only could have interfered with the ship, and she would have been at Bremen before any state of war with England existed. German vessels are shown to have used English ports and coast waters unmolested during the whole of August 4th. Germany's refusal to give the requested assurance regarding Belgium, the determining cause of England's participation in the war, did not become a certainty before the last hours of that day.

So far, therefore, from proving actual and immediate danger of war simultaneously involving actual and immediate danger of capture or detention on July 31st, when the ship turned back, the evidence shows that this specie could probably have been delivered as agreed before any actual war began or any immediate danger of capture or detention arose. The carrier's abandonment of the voyage deprived the shippers of the specie of all chance of having it so delivered. Thereby the carrier took the risk that the actual course of events might fail, as it did, to show actual and immediate danger threatening the ship, either at the time or before she could have made delivery.

The carrier's act cannot be justified, as in the *Styria*, 186 U. S. 1, 22 Sup. Ct. 731, 46 L. Ed. 1027, and *Nobel's Explosives Co. v. Jenkins* [1896] L. R. 2 Q. B. 326, "apart from the terms of the bill of lading"—on the ground that the master's "duty to take reasonable care of the goods intrusted to him" required it. For that purpose discretionary action by the master would be necessary, which, as above held, is not shown. Nor does the evidence show that regard for the safety of the specie entered into the owner's determination to abandon the voyage. No reason appears for apprehending that

capture or detention of the ship would, under the circumstances, have involved loss to the owners of the specie. The ship's value was considerably greater than the value of the specie, or the entire cargo on board. It was far more important to the owner of the ship than to the owners of the specie that she should avoid capture or detention by England, France or Russia. The evidence shows also that the order to turn this ship back to New York, instead of being a single order given with particular reference to this ship, or her cargo, or her relations thereto, was only one of many other like orders similarly transmitted during the same day to all steamships at sea belonging to the same owner, and then on voyages tending to bring them, if continued, within regions where, in case of actual war between Germany and the other countries named, their capture or detention might become possible. The owner's evident object was, not to avoid actual immediate danger of capture or detention then threatening these ships, but to keep them all as far removed as possible from any and all such regions of possible future danger. This may well have been the course most for the owner's advantage. But, under the contracts here sued on, it cannot just be held that the circumstances proved entitled her owner to divert this steamship from the voyage undertaken as above, without incurring any liability to the owners of the specie for their loss thereby caused. We know nothing more at present as to the amount of their loss than that it was substantial. Whatever they may prove their respective losses to have been, I consider the libelants in Nos. 1196 and 1199 entitled to recover against the steamship.

In regard to the cases Nos. 1197 and 1198, wherein the libelants were passengers, no reason is found for disturbing the result below. Not only did the contracts with these libelants permit the ship a far greater liberty to change or abandon the voyage than was permitted by the bills of lading, but they expressly required written notice of any damage claim, with full particulars, within 10 days after landing from the steamship, and it is admitted that no such notice was ever given. The libelant in 1197 accepted the return of his passage money; the libelant in 1198 accepted instead passage paid for by the claimant in another vessel. * * *

PUTNAM, Circuit Judge, dissenting. .

5. ARMY ORGANIZATION AND ADMINISTRATION

(a) *Branches of the Army*

1. UNITED STATES v. DUNN.

(Supreme Court of the United States, 1887. 120 U. S. 249, 7 Sup. Ct. 507, 30 L. Ed. 667.)

This was an appeal from the Court of Claims. The case is stated in the opinion of the court.

Mr. Justice MILLER delivered the opinion of the court.

The plaintiff brought her suit as administratrix of the estate of George Dunn, her husband, who died on the 29th of September, 1884, to recover the difference between what was paid her and what she claimed should have been paid on account of his service as gunner in the navy from the 11th day of April, 1878, until the 10th day of December, 1883. The Court of Claims gave her a judgment for \$2238.10. This judgment was rendered upon the following finding of facts:

"1. George Dunn, the claimant's intestate, was appointed a gunner in the navy, April 11, 1871, and served as such until January 1, 1883. He was subsequently retired, and has since died.

"2. Prior to his appointment in the navy, he had served in the Marine Corps. He entered this corps first, June 10, 1843, in the eleventh year of his age, as a boy bound for ten years and twenty-two days to learn music, and June 22, 1844, was rated as a fifer; discharged September 8, 1848.

"Re-enlisted September 9, 1848, for four years, as a fifer; discharged June 9, 1853.

"On the same day, to wit, June 9, 1853, he re-enlisted for four years, as a fifer; discharged February 24, 1857, under a surgeon's certificate.

"Re-enlisted May 19, 1857, for four years, as a fifer; discharged September 1, 1862, under a surgeon's certificate.

"The times of actual service from his first enlistment, June 10, 1843, to his last discharge, September 1, 1862, amounts to sixteen years five months and twenty-six days.

"3. Between the dates of his first enlistment and September 3, 1853, he served on board United States vessels of war, under the command of navy officers, for five years and two months.

"Where and under what command the remainder of his service was rendered does not appear.

"Conclusion of Law.

"Upon the foregoing findings of facts the court decides as conclusion of law—

"That the sixteen years five months and twenty-six days of service, shown in finding 2 to have been rendered by claimant's intestate as an enlisted man in the Marine Corps, should be credited to him in calculating longevity pay under the act of March 3, 1883. 22 Stat. 473 [Comp. St. 1916, § 2616].

"By so crediting this service the claimant is entitled to recover the sum of \$2238.10."

The controversy arises upon the construction to be given to the following clause in the act, making appropriation for the naval service, passed March 3, 1883. 22 Stat. 473. Section 1 of that statute makes provision for the payment of the officers of the navy, of which George Dunn, the plaintiff's intestate, was one at that time. After reciting the officers, clerks, and other persons, including naval cadets, whose compensation is embraced in the aggregate sum of three hundred thousand dollars, the section uses this language: "And all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular navy in the lowest grade having graduated pay held by such officer since last entering the service."

The plaintiff asserted that in adjusting her claim for her husband's service with the accounting officers of the department she was entitled to the benefit of this provision on account of the service found to have been rendered by him in the second subdivision of the facts as found by the court. These accounting officers refused to make this allowance because, as they said, the services thus rendered were in the Marine Corps and not in the army or navy.

It must be conceded that the Marine Corps, a military body in the regular service of the United States, occupies something of an anomalous position, and is often spoken of in statutes which enumerate "the Army, the Navy, and the Marine Corps," in a manner calculated and intended to point out that it is not identical with either the army or the navy. And this argument is the one very much pressed to show that service in the Marine Corps is not service in the army or in the navy. On the other hand, the services rendered by that corps are always of a military character, and are rendered as part of the duties to be performed by either the army or the navy. If there are services prescribed for that corps by the statutes of the United States, or the regulations of either the army or the navy, which are not performed in immediate connection with the army or the navy, either civil or military, we have not been made aware of it. The military establishment of this country is divided by the general laws of the United States into the army and the navy, and over each of these one of the great heads of departments, called secretaries, is appointed to preside, to manage and to administer its affairs. The administrative functions of the executive are mostly under the President, distributed and allotted among the seven great departments, at the head of each of which is a minister for that department. Such is the theory of the distribution of executive administration established by the statutes of the United States.

The Marine Corps is a military body designed to perform military services; and while they are not necessarily performed on board ships, their active service in time of war is chiefly in the navy, and accompanying or aiding naval expeditions. In time of peace they are located in navy yards mainly, although occasionally they may be used in forts and arsenals belonging more immediately to the army. The statutes of the United States, in prescribing the duties which they may be required to perform, have not been very clear in any expres-

sion which goes to show how far these services are to be rendered under the control of the officers of the navy or of the army. It is clear that they may be ordered to service in either branch; but we are of the opinion that, taking all these statutes and the practice of the government together, they are a military body, primarily belonging to the navy, and under the control of the head of the naval department with liability to be ordered to service in connection with the army, and in that case under the command of army officers.

Section 1599 of the Revised Statutes of the United States enacts that no person under twenty or over twenty-five years of age shall be appointed from civil life as a commissioned officer of the Marine Corps until his qualifications for such service have been examined and approved under the directions of the Secretary of the Navy; and 1600 (Comp. St. 1916, § 2919), immediately following, provides that all marine officers shall be credited with length of time that they have been employed as officers or enlisted men in the volunteer service of the United States. Sections 1613, 1614, 1615, and 1616 (Comp. St. 1916, §§ 2934, 2936, 2938, 2943) very clearly place the non-commissioned officers, musicians, or privates of the Marine Corps under the orders of the Secretary of the Navy, with reference to their performance in the Capitol grounds, or the President's grounds, and with reference to their rate of pay and their rations. Section 1621 (Comp. St. 1916, § 2948) declares that the Marine Corps shall at all times be subject to the laws and regulations established for the government of the navy, except when detached for service with the army by order of the President, and, when so detached, shall be subject to the rules and articles of war prescribed for the government of the army. Section 1623 (Comp. St. 1916, § 2950) which relates to the retirement of officers with rank and pay, enacts that, in the case of an officer of the Marine Corps, the retiring board shall be selected by the Secretary of the Navy, under the direction of the President. Two-fifths of the board shall be selected from the medical corps of the navy, and the remainder from the officers of the Marine Corps.

It seems to us that these provisions of the Revised Statutes, bringing together the enactments of Congress on the subject of the Marine Corps, show that the primary position of that body in the military service is that of a part of the navy, and its chief control is placed under the Secretary of the Navy, there being exceptions, when it may, by order of the President, or some one having proper authority, be placed more immediately for temporary duty, with the army, and under the command of the superior army officers.

This view of the subject was taken by this court in the case of *Wilkes v. Dinsman*, 7 How. 89, 12 L. Ed. 618. *Dinsman* was a private in the Marine Corps under *Commodore Wilkes* in the exploring expedition, and his term of service having expired he entered into a contract for reenlistment to serve until the return of the vessel. The act which authorized his reenlistment applied to seamen and to service of anybody enlisted for the navy. *Dinsman* was subjected to severe discipline by the orders of *Commodore Wilkes*, for which he brought this suit in the nature of an action of trespass, and alleged that after

the expiration of his service he was not lawfully reenlisted, as he was not a seaman when enlisted for the navy, by reason of his being in the Marine Corps. The court examined into this question and held that he belonged at that time to the navy, saying, among other things: "Though marines are not, in some senses, 'seamen,' and their duties are in some respects different, yet they are, while employed on board public vessels, persons in the naval service, persons subject to the orders of naval officers, persons under the government of the naval code as to punishment, and persons amenable to the Navy Department. Their very name of 'marines' indicates the place and nature of their duties generally. And, besides the analogies of their duties in other countries, their first creation here to serve on board ships expressly declared them to be a part 'of the crews of each of said ships.' Act of 27th March, 1794, 1 Stat. 350, § 4. Their pay was also to be fixed in the same way as that of the seamen, § 6, p. 351. So it was again by the act of April 27, 1798, 1 Stat. 552. And they have ever since been associated with the navy, except when specially detailed by the President for service in the army. * * * Thus paid, thus serving, and thus governed like and with the navy, it is certainly no forced construction to consider them as embraced in the spirit of the act of 1837 by the description of persons 'enlisted for the navy.'"

And referring to the act of June 30, 1834, the provision of which is found in section 1621 of the Revised Statutes, "that the said corps shall at all times be subject to and under the laws and regulations which are or may hereafter be established for the better government of the navy," the opinion says that this strengthens the conclusion of the court, and that that corps thus in some respects became still more closely identified with the navy.

Whatever view may be taken, it cannot be considered as a distinct military organization, independent of the departments of the army and navy, and under the supervision and control of neither of them, having no superior outside of its own officers, except the President. Such a position is at war with the whole policy of the distribution of power among the executive departments, as we have already shown; and while it may be true that it is not so exclusively a part of the navy as ships and navy yards are, yet its general supervision and control remain with the Navy Department.

We think that the act of 1883, under which this suit is brought, providing for a credit for the actual time of service in the army or navy, or both, is comprehensive enough to include the services of George Dunn, recited in the second finding of the court, as they must have been rendered either in the one or the other,—either in the army or the navy,—and if rendered in either, or part in one and part in the other, they still entitle the claimant to receive compensation on the basis of services coming within the statute.

The judgment of the Court of Claims is affirmed.

2. McCLAUGHRY v. DEMING.

(Supreme Court of the United States, 1902. 186 U. S. 49, 22 Sup. Ct. 786, 46 L. Ed. 1049.)

Appeal from the Circuit Court of the United States for the District of Kansas to review an order discharging a prisoner on habeas corpus in accordance with the judgment of the Circuit Court of Appeals for the Eighth Circuit. Affirmed.

See same case below, in Circuit Court of Appeals, 113 Fed. 639.

A petition for a writ of habeas corpus was presented to the circuit court of the United States for the district of Kansas, first division, asking that Peter C. Deming, once a captain in the subsistence department of the Volunteer Army of the United States, might be produced by Robert W. McLaughry, the appellant herein, in whose custody Deming was placed, McLaughry being the warden of the United States prison at Fort Leavenworth, Kansas.

On the part of Deming it was shown in the petition that he was imprisoned and restrained by virtue of a sentence imposed upon him by a general court-martial of the United States, convened at the Presidio of San Francisco, California, by William R. Shafter, Major General, United States Volunteers, and Brigadier General of the United States Army, retired, being of the age of sixty-four years. The sentence imposed upon Deming by the court-martial was that he should be dismissed from the service of the United States, and be confined in such penitentiary as the reviewing authority might direct for the period of three years, and that the crime, punishment, name, and place of abode of the accused should be published in the newspapers in and about the city of San Francisco, and in the state where the accused usually resided. The sentence was approved by the Secretary of War and affirmed by the President of the United States on June 8, 1900. * * *

It was further shown in the petition that Deming was an officer in the Volunteer Army and forces of the United States, and that the members of the court-martial who tried him, were all officers in the Regular Army, and it was averred that he could not legally or lawfully be tried by a court-martial composed of such officers, because it would be in direct violation of the 77th article of war, § 1342, Revised Statutes of the United States, which reads as follows:

"Article 77. Officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces, except as provided in article 78."

"Article 78. Officers of the Marine Corps, detached for service with the Army by order of the President, may be associated with officers of the Regular Army on courts-martial for the trial of offenders belonging to the Regular Army, or to forces of the Marine Corps so detached; and in such cases the orders of the senior officer of either corps, who may be present, and duly authorized, shall be obeyed."

It was further averred in the petition that Deming was tried and convicted without due process of law and in violation of the 5th Amendment of the Constitution of the United States; that the court-martial was an illegal one and without warrant of law, and the sentence im-

posed upon Deming was without warrant or authority of law, illegal and void. A writ of habeas corpus was prayed for, to be directed to the warden, commanding him to have the body of Deming before the court. This petition was sworn to in behalf of Deming by the petitioner J. H. Atwood.

Upon that petition the writ issued, and the warden, in compliance therewith, produced Deming and made return to the writ in substance, as follows: That William R. Shafter was a major general of volunteers, exercising command of the Department of California, by virtue of an assignment of the President of the United States, as Commander-in-Chief of the Army; that on March 29, 1900, pursuant to authority and in conformity with the provisions of article 72 of the articles of war, General Shafter appointed a general court-martial, by special orders, to meet at the Presidio of San Francisco on April 3, 1900, or as soon thereafter as practicable, for the trial of Peter C. Deming, assistant commissary of subsistence, United States Volunteers, the detail of which court-martial was then stated, and which was the same as that already mentioned in the order convening the court. It was admitted that all the members of the court-martial so detailed were members of the Regular Army; that on April 5, 1900, the court proceeded to the trial of Deming, who, being present in court, the order convening the court was read to him, and he was asked if he objected to being tried by any member present named in the order convening the court, to which he replied in the negative. The members of the court and the judge advocate were then duly sworn, the court adjourning to meet again on April 23, 1900, at which time all the members of the court were present, and the judge advocate and Deming, the accused, with counsel. The accused was then arraigned upon charges of embezzling public money of the United States in violation of the 60th article of war, and conduct unbecoming an officer and a gentleman in violation of the 61st article of war; that thereupon Deming pleaded guilty, and the court-martial then passed sentence upon him, which was set forth in the return, and has been already stated.

The return further stated that on May 2, 1900, the proceedings, findings, and sentence of the court-martial were approved by Major-General Shafter, and submitted for the action of the President pursuant to the provisions of article 106 of the articles of war, and that thereafter on June 8, 1900, the sentence was confirmed by the President of the United States, and on that day, by direction of the Secretary of War, Deming ceased to be an officer of the Army of the United States, and the penitentiary at Fort Leavenworth, Kansas, was designated as the place for his confinement.

A certified copy of the record and proceedings of the court-martial duly authenticated under the laws of the United States, together with a copy of the order for the court-martial, the proceedings, findings, and sentence in the case, were attached to the return of the warden, and made a part of it.

The facts above detailed also appear in the record of the court-martial.

The petitioner demurred to the return as not stating facts sufficient to warrant the detention of the petitioner in custody, nor to warrant

the refusal of the writ of habeas corpus, prayed for in the petition, and because such facts did not give the warden any legal right to deprive Deming of his liberty.

Although it does not appear distinctly in the record, yet it is conceded that upon the argument before the district judge the writ was discharged and the prisoner remanded to the custody of the warden, and that upon appeal to the circuit court of appeals that court reversed the order of the circuit court, and directed that the writ issue and that Deming be discharged from custody. Thereafter, in accordance with the judgment of the circuit court of appeals, Deming was discharged by the circuit court, and from the order of the court so discharging him the government has appealed to this court.

Mr. Justice PECKHAM, after stating the foregoing facts, delivered the opinion of the court:

The grave question in this case relates to the power of an officer convening a court-martial for the trial of an officer of volunteers, to compose that court entirely of officers of the Regular Army. It is claimed on the part of the respondent herein that a volunteer officer could not be legally tried by such a court, and that to convene and constitute a court-martial so composed, for the trial of a volunteer officer, was a violation of the 77th article of war, above set forth.

The circuit court of appeals for the eighth circuit held, in a very clear and satisfactory opinion (113 Fed. 639, 51 C. C. A. 349), that the trial of Deming by a court-martial, all the members of which were officers of the Regular Army, was illegal, and that the objection could be taken on habeas corpus. The reasoning of the opinion leaves little to add further than to state our concurrence therein. As the case is one of considerable importance in its results, it is, however, proper that we should ourselves state the reasons which lead us to the conclusion that the order appealed from was right, and should be affirmed.

The government seeks a review of the decision of the court below, upon the strength of three propositions, argued by its counsel, upon one or all of which a reversal of the decision of that court is sought. These propositions are as follows:

(1) That the Volunteer Army of 1899, of which Deming was an officer at the time of his trial, conviction, and sentence, was not "other forces" within the meaning of article 77 of the articles of war.

(2) That even if Deming were to be treated as an officer of "other forces" within the meaning of that article, the fact would not deprive the court-martial of regular officers who tried him of jurisdiction; this article relating entirely to the competency of members of a court-martial, not at all to its jurisdiction.

(3) The court-martial having jurisdiction and acting within its powers, its proceedings cannot be assailed by habeas corpus.

Taking these propositions in the order named, we are brought to the consideration of the meaning and application of the 77th article of section 1342 of the Revised Statutes of the United States (page 237), commonly called the articles of war. Article 78 has no application to this case, which rests upon the proper construction of article 77. The reading of the latter article shows that the existence of other forces than those of the Regular Army is contemplated. When a volunteer force

is spoken of as well as a regular army force, in the statutes of the United States, such force would seem to come within the description of some other force than that of the Regular Army.

But the claim is made on the part of the government that by virtue of the act of Congress of April 22, 1898 (30 Stat. at L. 361, chap. 187), and particularly that of March 2, 1899 (30 Stat. at L. 977, chap. 352), the officers of the Volunteer Army of the United States are not properly described by the words "other forces," within the meaning of the 77th article of war.

It is said that while the course of legislation prior to the passage of the acts above mentioned showed a clear distinction between the militia or volunteer forces and the Regular Army of the United States, the acts referred to, and especially that of 1899, changed the status of the volunteer forces enlisted under them, and, so far as the 77th article of war is concerned, rendered such force, in reality, the same in substance as the forces of the Regular Army, and not "other forces" of the country. We think this claim is unfounded, and that the distinction still exists within the meaning of the article.

The 77th article of war as enacted in 1874 was but a substantial continuation of provisions found in various acts of Congress from the foundation of the government. In September of the year 1776 the Continental Congress enacted what is termed the Military Code of that year. In that Code is to be found section 17, art. 1, which reads as follows:

"Sec. 17, art. 1. The officers and soldiers of any troops, whether minute-men, militia, or others, being mustered and in continental pay, shall at all times, and in all places, when joined, or acting in conjunction with the regular forces of the United States, be governed by these rules or articles of war, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of militia officers of the same provincial corps with the offender.

"That such militia and minute-men as are now in service, and have, by particular contract with the respective states, engaged to be governed by particular regulations while in continental service, shall not be subject to the above articles of war." 2 Winthrop, *Military Law & Precedents*, p. 1501.

From the text of this section it is argued on the part of the government that the purpose of its passage was not to guard against the feeling of jealousy and distrust with which the professional soldier was regarded, as was stated by the court below, because, as the government claims, the regular forces of the Revolutionary War period were not made up of professional soldiers, and also because the article provided, not only that the trials of militiamen should be before courts-martial composed entirely of militia officers, but that such officers should be of the same provincial corps with the offender. All this language, it is claimed, was but an expression in military legislation of the political doctrine, generally urged at that time in extreme form, that each state should be to the greatest extent practicable self-governing.

We think, however, there was, in addition to the idea of state control over the troops from a state, a recognition of the fact that there

was a substantial difference between the regular forces and the militia. There was a recognition of the undoubted fact that at all times there has been a tendency on the part of the regular, whether officer or private, to regard with a good deal of reserve, to say the least, the men composing the militia as a branch not quite up to the standard of the Regular Army, either in knowledge of martial matters or in effectiveness of discipline, and it can be readily seen that there might naturally be apt to exist a feeling among the militia that they would not be as likely to receive what they would think to be as fair treatment from regulars, as from members of their own force. The reasons for the feeling are set forth fully in the opinion below, and we think quite correctly. It is most probable that Congress recognized all these reasons in its earliest legislation upon the subject as considerations upon which that legislation was founded.

This Military Code with the above-mentioned section remained in force during the War of the Revolution and until 1806. Various acts were passed in the meantime providing for calling the militia into active service, and the acceptance of volunteers was also authorized by the act of March 3, 1791, § 8 (1 Stat. at L. 222, 223, chap. 28), and by that of May 28, 1798 (1 Stat. at L. 558, chap. 47), but, as stated by counsel for the government, none of the organizations of volunteers authorized by the legislation was actually received into the service of the general government and organized as United States troops.

By the act of April 10, 1806 (2 Stat. at L. 359, chap. 20), Congress established rules and articles for the government of the Army of the United States. Among them is the following:

"Art. 97. The officers and soldiers of any troops, whether militia or others, being mustered and in pay of the United States, shall, at all times and in all places, when joined, or acting in conjunction with the regular forces of the United States, be governed by these rules and articles of war, and shall be subject to be tried by courts-martial in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of militia officers."

This section, it will be observed, leaves out the words "of the same provincial corps with the offender," which are contained in section 17 of the Military Code of 1776, above set forth, thus leaving the militia to be tried by courts-martial the members of which shall be composed entirely of militia officers. While the provision that the courts-martial should be composed of militia officers of the same provincial corps with the offender was left out, the other provision that the courts should be composed entirely of militia officers was retained. This legislation still recognized the difference between the militia and the regular forces, and provided for the trial of militia offenders by militia officers, while at the same time the restriction that such officer should be of the same provincial corps with the offender was stricken out, thus showing that of the two ideas, the one which recognized the general ground of distinction between the regular and the militia forces was stronger than that which restricted the trial of a member of the militia to courts-martial composed of the same provincial corps.

While it may be that there was then no particular distrust or jealousy

of the Regular Army, the provision in question recognized, as we have said, the difference there was between the two bodies, the regulars and the militia or volunteers, and Congress still thought it proper to provide that those composing the latter force should not be tried by officers of the former. It was not jealousy or distrust of the Regular Army which led to the enactment; it was the radical difference existing between the two forces which made it proper to provide that regular officers should not sit in courts-martial to try offenders in the volunteer forces.

History shows that no militia, when first called into active service, has ever been equal to a like number of regular troops. It is not that the men composing the militia force are less brave or less intelligent, but they lack actual experience which the regulars have, and it is that fact which gives the regulars the feeling of superiority, and it is that feeling which is recognized by Congress and which has resulted in legislation of this character.

Further distinctions between the two forces are very well stated in the opinion of the circuit court of appeals in this case.

This section 97 of the act of 1806 continued in force until the revision of the law of 1874. During this time the war of 1812, the Seminole war, the Mexican war, and the Civil war were all carried on. During the Civil war the volunteer troops, called for under the first proclamation of the President, came primarily as state troops, and the general orders of the War Department provided for the appointment of all field and company officers by the governors of the states who were to commission them. The same provisions in substance were contained in the subsequent acts of 1861. See acts of July 22, 1861, 12 Stat. at L. 268, chap. 9; and August 6, 1861, chapter 57, § 3, 12 Stat. at L. 317.

The statute of July 22, 1861, which provided that when vacancies occurred in any of the volunteer organizations received into the service under that act, they should be filled by election, and that the officers so elected should be commissioned by the respective governors of the states, or by the President of the United States, was amended by the act of August 6, 1861, which provided for the appointment and commissioning of officers of volunteers exclusively by the governors of the states furnishing the same.

The question of the meaning of the 97th article of war, with reference to the volunteer forces of the Civil war, was presented to Judge Advocate General Holt, who, on November 19, 1863, in an opinion, expressed himself as follows: "The words 'militia officers,' as employed in the 97th article of war, have been interpreted since the commencement of the rebellion as synonymous, as far as the organization of courts-martial is concerned, with volunteer officers. This construction undoubtedly accords with the spirit of the article, and in its practical enforcement the object of the rule is accomplished," the object of the rule being that members of the volunteer forces of the Army at that time should be tried only by courts-martial composed of volunteer officers.

The intent of the legislation of 1874 was simply to preserve the rule which had existed from the formation of the government, and to keep up the distinction between the Regular Army and the volunteer forces,

so far as to maintain the practice of trying volunteers by volunteer officers. The question was not so much how the volunteer or "other forces" came into the service of the government, whether under officers appointed and commissioned by governors of their states, or by direct enlistment as volunteers, to aid the government, but whether they were in fact volunteers, and not members of the Regular Army. If they were volunteers, the same reasons for not being tried by regular army officers were present, whether they first volunteered through the state, and were then mustered into the service of the government, or entered directly into that service, for in both cases they were volunteers, and were not members of the Regular Army.

The acts of Congress of 1898 (30 Stat. at L. 361, chap. 187), and of 1899 (30 Stat. at L. 977, chap. 352), show conclusively, as we think, that the distinction was kept up and in the mind of Congress between the Regular Army and the Volunteer Army of the United States, and the declaration of § 2 of the act of 1898, which provides that in time of war the Army shall consist of two branches, which shall be designated respectively as the Regular Army and the Volunteer Army of the United States, is a plain recognition by Congress of the difference between the two forces. We cannot read the various provisions of these two acts of Congress without being brought to the conclusion that they contemplated and particularly provided for the existence of other forces than that of the Regular Army. The Volunteer Army was one of such other forces, and also the militia when in active service of the United States, and the Marine Corps when detached and placed upon duty with the Army by order of the President. The volunteer force is certainly not the regular force or army, and if not, it must be some other force, and if so, its members cannot be tried by officers of the regular force or army. The act of 1899 does not assume to repeal that of 1898, excepting some specific provisions thereof, such as are mentioned in section 11 of the act of 1899. The balance of the earlier act remains in force, except as to any provision which may be in conflict with the act of 1899. Upon this particular matter of a distinction between the Regular Army and the Volunteer Army, there is no inconsistency between the two acts, and therefore the act of 1898 on that subject remains in connection with that of 1899.

It would unduly lengthen this opinion to cite the various sections of the two acts which provide for and prove this difference. It was done with much detail by the judge who wrote the opinion in the circuit court of appeals when this case was before that court, and we refer to that opinion for those details which in our judgment are controlling proof that the volunteer officers and men constitute other forces than the Regular Army within the meaning of the 77th article of war.

Section 14 of the act of 1898 seems to us particularly significant of the desire of Congress to recognize and keep up the distinction between these various forces of the Army of the United States. It proves its purpose to keep the interests of the volunteer troops particularly in mind, and that they should be looked after by members of their own body. It is therein provided that a general commanding a separate department or a detached army shall have authority to appoint military boards of not less than three nor more than five of the volunteer of-

ficers of the Volunteer Army to examine into the capacity, conduct, and efficiency of any commissioned officer of that army within his command. They were to be, not only officers of the Volunteer Army, but were themselves to be volunteer officers. This section of the act of 1898 has never been repealed, and is not in conflict with any part of the act of 1899. Although the volunteer troops organized under the last act of Congress were mustered directly into the service of the United States without regard to state or territory lines, yet the very provisions of both these acts with regard to volunteers show that they were organized as volunteers for a temporary purpose only, and did not form any part of the force of the Regular Army. The same reasons which have existed since the formation of the government for prohibiting trials of such men by courts-martial composed of regular army officers exist under these acts. The 77th article of war by its terms covers such a case. It has not been repealed or amended. The reasons for its enactment still remain as strong as when it was first adopted, and we think it covers the case of this officer who belongs to the Volunteer Army, raised under the act of 1899 and who was tried by a court-martial composed of regular army officers in violation of the act of Congress in that behalf. Congress could, of course, legislate for and temporarily enlarge the Regular Army, and the troops so enlisted for such Regular Army would be regular troops, notwithstanding they might be enlisted only for the term of the duration of a war then imminent or actually existing. Such was the act of February 11, 1847 (9 Stat. at L. 123, chap. 8), in regard to the war with Mexico. But that has no material bearing upon the proposition that troops not so enlisted, but, on the contrary, enlisted simply and in terms as volunteers, would not be troops of the Regular Army, but would be what they purport to be, volunteers, a separate branch from the regulars, and constituting by the terms of the statute other forces than such regulars.

The mere fact of a direct enlistment of the volunteers into the service of the United States under the act of 1899 cannot, as we have said, change the essential character of the Volunteer Army as a different and separate force from that of the Regular Army.

By the act of February 24, 1864 (13 Stat. at L. 6, chap. 13, § 24), it was provided:

"That all able-bodied male colored persons, between the ages of twenty and forty-five years, resident in the United States, shall be enrolled according to the provisions of this act, and of the act to which this is an amendment, and form part of the national forces. * * *

"But men of color, drafted or enlisted, or who may volunteer into the military service, while they shall be credited on the quotas of the several states, or subdivisions of states, wherein they are respectively drafted, enlisted, or shall volunteer, shall not be assigned as state troops, but shall be mustered into regiments or companies as United States colored troops."

Here was a case where the colored troops were mustered directly into regiments or companies as United States (colored) troops, although credited on the quotas of the several states. They became United

States troops, yet were not part of the Regular Army of the United States.

The Judge Advocate of the Army on December 16, 1864, rendered an opinion as to the composition of courts-martial for the trial of officers and soldiers in the Veteran Reserve Corps and United States colored troops, in which he used this language:

"In the absence of any statute law which either designates officers of the Veteran Reserve Corps or of the United States colored troops as regulars in express terms, or by a necessary implication from its provisions, fixes upon them this status, the Secretary of War has not proceeded to so characterize them, and until he shall do so these officers should, so far as the composition of courts-martial is concerned, be regarded as a part of the volunteer force."

Without some statute, otherwise providing therefor, the Judge Advocate General was of opinion that those forces should be regarded as a part of the volunteer forces unless the Secretary of War otherwise characterized them. Whether that official had power to do so need not now be inquired into, but unless he did so the Judge Advocate General thought that the United States colored troops were to be regarded as a part of the volunteer forces.

We conclude that the acts of 1898 and 1899 still left the Volunteer Army as a separate, or other force from the Regular Army of the United States.

The second proposition argued by counsel for the government we cannot agree to. If the defendant were a member of one of the "other forces," named in the 77th article of war, a court-martial, solely convened for the purpose of trying him, composed entirely of regular officers, would not have jurisdiction. Such a body would have jurisdiction over neither the subject-matter nor the person. A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction. It was said by Mr. Chief Justice Waite in *Runkle v. United States*, 122 U. S. 543, 555, 7 Sup. Ct. 1141, 1146, 30 L. Ed. 1167, 1170:

"A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved. 3 Greenl. Ev. § 470; *Brooks v. Adams*, 11 Pick. (Mass.) 441, 442; *Mills v. Martin*, 19 Johns. (N. Y.) 7, 30; *Duffield v. Smith*, 3 Serg. & R. (Pa.) 590, 599. Such, also, is the effect of the decision of this court in *Wise v. Withers*, 3 Cranch, 331, 2 L. Ed. 457, which, according to the interpretation given it by Chief Justice Marshall in *Ex parte Watkins*, 3 Pet. 193, 209, 7 L. Ed. 650, 655, ranked a court-martial as 'one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally.' To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. *Dynes v. Hoover*, 20 How. 65, 80, 15 L. Ed. 838, 844; *Mills v. Martin*, 19 Johns. (N. Y.) 33. There are no presumptions in

its favor, so far as these matters are concerned. As to them, the rule announced by Chief Justice Marshall in *Brown v. Keene*, 8 Pet. 112, 115, 8 L. Ed. 885, 886, in respect to averments of jurisdiction in the courts of the United States, applies. His language is: 'The decisions of this court require that averment of jurisdiction shall be positive,—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments.' All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction, and that their sentences were conformable to law, must be stated positively; and it is not enough that they may be inferred argumentatively."

What jurisdiction can a court-martial have which is composed of officers incompetent to sit on such court, of officers who are placed there in direct and plain violation of the act of Congress? This particular court was convened for the sole purpose of trying an officer of the Volunteer Army, and it was composed under the orders of the officer convening it of members each and all of whom were prohibited by law from sitting on such court. As to the officer to be tried there was no court, for it seems to us that it cannot be contended that men, not one of whom is authorized by law to sit, but, on the contrary, all of whom are forbidden to sit, can constitute a legal court-martial because detailed to act as such court by an officer who in making such detail acted contrary to and in complete violation of law. Where does such a court obtain jurisdiction to perform a single official function? How does it get jurisdiction over any subject-matter or over the person of any individual? The particular tribunal is a mere creature of the statute, as we have said, and must be created under its provisions. It is a special body convened for a specific purpose, and when that purpose is accomplished its duties are concluded and the court is dissolved. The officers composing the alleged court were not *de facto* officers thereof, for there was no court, and therefore it could not have *de facto* officers. *Norton v. Shelby County*, 118 U. S. 425, 441, 6 Sup. Ct. 1121, 30 L. Ed. 178, 185. The attempt at the creation of a court failed because such attempt was a plain violation of the statute. A court-martial is wholly unlike the case of a permanent court created by constitution or by statute and presided over by one who had some color of authority although not in truth an officer *de jure*, and whose acts as a judge of such court may be valid where the public is concerned. The court exists even though the judge may be disqualified or not lawfully appointed or elected. But in this case the very power which appointed the members of and convened the court violated the statute in composing that court. It is one act, appointing the members of and convening the court, and in performing that act the officer plainly violated the law. Is such a court a valid court and the members thus detailed *de facto* officers of such valid court? Clearly not.

It is urged, however, that the 77th article of war contains no reference to the jurisdiction of courts-martial; that it merely provides that certain officers shall not be competent to sit on such courts to try certain offenders, and that the jurisdiction of the court to hear and de-

cide is regulated by other articles. But the court-martial that has jurisdiction over any offense must, in the first place, be legally created and convened. Such a court is not a continuous one, created by the statute itself and filled from time to time by appointments of certain members under the power given by statute. The court has no continuous existence, but under the provisions of the statute it is called into being by the proper officer, who constitutes the court itself by the very act of appointing its members; and when in appointing such members he violates the statute, as in this case, by appointing men to compose the court that the statute says he shall not appoint, the body thus convened is not a legal court-martial, and has no jurisdiction over either the subject-matter of the charges against a volunteer officer or over the person of such officer. The act of constituting the court is inseparable from the act which details the officers to constitute it. It is one act, and the court can have no existence outside of and separate from the officers detailed to compose it. By the violation of the law the body lacked any statutory authority for its existence, and it lacked, therefore, all jurisdiction over the defendant or the subject-matter of the charges against him. It is said, in *Keyes v. United States*, 109 U. S. 336, 3 Sup. Ct. 202, 27 L. Ed. 954, that where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment.

Within the *Runkle Case*, 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. Ed. 1167, this particular court was not legally constituted to perform the function for which alone it was convened. It was therefore in law no court. The men were disqualified to act as members thereof, and no challenge was necessary for there was no court to hear and dispose of the challenge. It is unlike an officer who might be the subject of challenge as under some bias. A failure to challenge in such a case might very well be held to waive the defect, and the officer could sit and the finding of the court be legal. But this is not the case of a personal challenge of some member of the court where an objection to his sitting might be thus particularly raised. It is an objection that the whole court as a court was illegally constituted because in violation of the express provision of the statute, and the challenge to the whole court is not provided for by the statute. * * *

For the reasons already given, we think the court was illegally constituted, in violation of law, and that it had no jurisdiction over the person of the defendant or the subject-matter of the charges against him, and that consent could confer none in opposition to the statutory requirements for members of a court-martial convened to try him.

The question of who shall act on courts-martial for the trial of offenders belonging to the various branches of the Army of the United States is one entirely for Congress to determine. If it should think the time has come to do away with the distinction between the volunteer or militia force and the Regular Army, it rests in its discretion to so provide.

We are of opinion, after a careful examination of this record, that the decision of the court below was right, and the order discharging the defendant from custody should be affirmed.

The CHIEF JUSTICE and Mr. Justice McKENNA dissented. Mr. Justice GRAY and Mr. Justice BREWER did not hear the argument, and took no part in the decision.

(b) *Officers*

1. UNITED STATES v. HUNT.

(Supreme Court of the United States, 1871. 14 Wall. 550, 20 L. Ed. 739.)

Appeal from the Court of Claims; the case being thus:

The third section of the act of March 3d, 1865, (13 Stat. at Large, 497,) enacts:

"That from and after the first day of March, 1865, and during the continuance of the present rebellion, the commutation price of officers' subsistence shall be fifty cents per ration: Provided, That said increase shall not apply to the commutation price of the rations of any officer above the rank of brevet brigadier-general, or of any officer entitled to commutation for fuel or quarters."

Under this enactment, Hunt, a brigadier-general of volunteers, filed a petition in the Court of Claims claiming commutation pay. The United States demurred; thus admitting, of course, that the petitioner was a brigadier-general during the recent civil war, and was not entitled to commutation for fuel and quarters. He was then entitled to the increased commutation for subsistence if his rank of brigadier was not above the rank of brevet brigadier. The question was, was it such?

The Court of Claims gave judgment in favor of the petitioner, and the United States appealed, assigning as error that a brigadier-general is above the rank of a brevet brigadier-general, and therefore not entitled to the benefit of this provision.

The CHIEF JUSTICE delivered the opinion of the court.

Our duty in construing acts of Congress is to give the meaning to words which Congress obviously intended. It may be that in the strict sense of the military term the rank of brigadier and brevet brigadier is the same, but it is well known that practically they are by no means identical, and that the position of the former is, in many respects, better than that of the latter. Brevet rank is conferred, in theory at least, for special and meritorious services by commission from the President, under authority of an act of Congress. It does not entitle the holder to corresponding pay or command, except under special circumstances defined by law. When an officer holding rank by brevet receives a regular commission of the same grade, he is said to be promoted and to become a full officer of that rank. These circumstances make it evident that there is a difference of military position between an officer by brevet and an officer by regular commission, and that the one is less eligible than the other. And Congress seems to have referred to this distinction of position rather than to technical rank in the provision under consideration. If they did not, why employ the word brevet at all? Why use the term brevet brigadier when it was so easy to say brigadier, and thus avoid all ambiguity?

We think that Congress had in view the distinction between brevet rank and regular rank, to which we have referred, and regarded the latter as above the former. The practice of the Department of War, as we understand, and of the accounting officers, has been in accordance with this view, and seems to us correct.

Judgment reversed.

2. MIMMACK v. UNITED STATES.

(Supreme Court of the United States, 1878. 97 U. S. 426, 24 L. Ed. 1067.)

Mr. Justice CLIFFORD delivered the opinion of the court.

Nothing short of a written resignation to the President, or the proper executive department, by a commissioned officer of the army, navy, or marine corps, and the acceptance of the same duly notified to the incumbent of the office, in the customary mode, will of itself create a vacancy in such an office, or prevent the incumbent, if the President consents, from withdrawing the proposed resignation; in which event the rights, privileges, duties, and obligations of the officer remain just as if the resignation had never been tendered.

Prior to notice that the resignation tendered has been accepted by the President, the officer in such a case may not without leave quit his post or proper duties, nor is he deprived of any of the rights or privileges conferred and enjoyed by virtue of his appointment and commission.

Charges, with specifications of drunkenness on duty, were made to Brevet-Brigadier-General J. H. Potter, commanding Fort Sedgwick, against the petitioner; and the record shows that the petitioner proposed to that officer that, on condition that the charges should not be prosecuted, he, the petitioner, would place his resignation as captain and brevet-major in the hands of the officer to whom the charges were preferred, to be held by him and not to be forwarded to the War Department if he, the accused, should thereafter entirely abstain from the use of intoxicating liquors; and that on the 10th of May, 1868, the petitioner enclosed his resignation, addressed to the adjutant-general of the army, in a letter to the officer commanding Fort Sedgwick, stating that the resignation was without date, and authorizing the party to whom the letter was addressed to place the resignation in the hands of the department commander, to be forwarded to the War Department should he, the petitioner, ever again become intoxicated.

Pursuant to the request of the letter and the authority it conferred, both the letter and the resignation of the petitioner were forwarded to the commander of the department, who was fully informed of the purpose for which the documents were forwarded.

Previous to October in the same year, the petitioner again became intoxicated on duty, and was by such continued excesses confined to his bed in a state bordering on delirium tremens, in consequence of which the commander at Fort Sedgwick placed him under arrest, and ordered him to turn over the property of the company in his hands, as therein directed. Due notice that the petitioner had again "broke

out hard drinking," and that he had been placed under arrest and ordered to hand over the company property, was given to the department commander on the same day. Two days later, the department commander forwarded the resignation of the petitioner, with the date filled up, Oct. 5, 1868, to the War Department; but the finding of the court below shows that the date of the resignation was not filled up by the petitioner, nor was he informed of the communication sent to the department commander, nor of the fact that his resignation was to be forwarded to the War Department. On the 29th of the same month, the resignation of the petitioner was accepted by the President, and notice to the petitioner of that date of such acceptance was duly forwarded, which, as the findings of the subordinate court show, was received by him on the 8th of November following.

By those proceedings it was at the time supposed that a vacancy was created, and ten days subsequently the President promoted First-Lieutenant Appleton D. Palmer to be captain in the thirtieth regiment of infantry, vice Bernard P. Mimmack, resigned, and notice thereof was sent by letter to the appointee of that date, but he was not then commissioned. On the 11th of December following, the President, on the application of the petitioner, revoked his acceptance of the resignation of the petitioner, and ordered him to duty, and notice thereof was given to the Secretary of War.

Proofs having been taken, the parties were heard; and the court rendered judgment that the petition should be dismissed, the conclusion of law adopted being that the revocation by the President of his acceptance of the petitioner's resignation, after due notice to the petitioner of such acceptance, did not restore the petitioner to the army. From which judgment the petitioner appealed to this court.

Full pay and allowances are claimed by the petitioner from the 11th of December, 1868, to the date of the judgment, amounting to the sum of \$9,344.29, as appears by the statement of his account annexed to his petition.

Three principal errors are assigned: 1. That the court erred in holding that the revocation by the President of his acceptance of the supposed resignation of the petitioner, after the petitioner was notified of such acceptance, did not restore him to the army. 2. That the court erred in holding that the petitioner did in fact resign his office as captain in the army, and that the writing signed by him and shown in the record was in law and fact his resignation. 3. That the court erred in holding that by the said paper coming to the hands of the President and his acceptance of it as a resignation, and notice of such acceptance to the petitioner, he ceased in law to be an officer in the army of the United States.

Attempt is made to support these several propositions by the facts exhibited in the findings of the court below, in addition to those already reproduced, from which the petitioner insists that the court here may decide that the petitioner never resigned his commission, and that the office he held under it never became vacant.

On the next day after the President revoked his acceptance of the resignation of the petitioner, a report of the facts of the case was made to the President by the War Department; and on the 24th of the

same month the report was returned by the President to the Secretary of War, for action under the prior order of the President, when the report and the direction of the President were referred to the General of the Army. Due consideration having been given to the matters so referred to him, the General of the Army requested that before an order was issued the opinion of the Attorney-General might be obtained as to the legality of the President's revocation of his acceptance of the petitioner's resignation.

On the 13th of the same month, the name of Appleton D. Palmer, previously placed on the list of nominations as first lieutenant, was, by the direction of the President, stricken from the list of nominations to be sent to the Senate, and the Secretary of War was duly notified of that fact.

Pursuant to the request of the General of the Army, the case of the petitioner, with the papers relating thereto, were, on the 4th of the succeeding month, submitted by the Secretary of War to the Attorney-General, who subsequently gave it as his opinion that the President's revocation of his acceptance of the petitioner's resignation did not have the effect of restoring him to his former position in the military service. *Mimmack's Case*, 12 Op. Att'y-Gen. 555.

Without much delay, the opinion of the Attorney-General and the papers containing the order of the President were sent to the General of the Army, and he declined to permit his name to be used in promulgating the order, as he was of the opinion that it was illegal, and concurred with the Attorney-General.

All the proceedings thus far in the case took place during the administration of President Johnson. On the 11th of March, 1869, President Grant nominated First-Lieutenant Appleton D. Palmer to be captain, Oct. 29, 1868, vice Bernard P. Mimmack, resigned; but the Senate did not act on the nomination, and it was renewed on the following December, and on the 22d of the same month the nomination was confirmed by the Senate.

Four principal questions arise in the case, and it is clear that, if they are all decided adversely to the petitioner, the judgment of the court below must be affirmed. They are as follows: 1. Did the petitioner resign, as found by the Court of Claims? 2. Did the President accept his resignation, and cause him to be notified of the acceptance of the same? 3. Could the President revoke his acceptance of the petitioner's resignation, after having given him notice that it was accepted? 4. Is there any thing in the other facts found by the court below to show that the resignation as accepted was ever legally revoked or rendered inoperative?

Sufficient appears to show that the resignation without date was written by the petitioner, and that it was enclosed by the petitioner in a letter and sent to the commander at Fort Sedgwick, with the request to place it in the hands of the department commander, to be forwarded to the War Department should he, the petitioner, ever again become intoxicated. Beyond all question, the resignation, voluntarily written and signed by the petitioner, together with the letter enclosing the same, was placed in the hands of the department commander pur-

suant to his request, with directions that it should be forwarded to the War Department in case he should ever again commit the offence described in the charges previously preferred against him by the commander of Fort Sidney.

Nor does it make any difference that the resignation was without date, as it is a clear legal proposition that the petitioner, by placing the resignation in the hands of the depository, with power to forward it to the War Department in the event described, authorized the holder, upon the happening of the event, to fill up the date; and the subsequent conduct of the petitioner supports the conclusion that the depository did not exceed his authority.

Viewed in the light of these suggestions, it is clear that the delivery of the resignation must be regarded as of the same validity as it would have had if the blank date had been filled up by the petitioner, and he had personally transmitted it to the War Department. Opposed to that is the suggestion that the transaction is one of an unusual character; but the answer to that is that the proposition came from the petitioner, and that it does not lie with him to call in question either its propriety or validity.

Argument to show that the President did accept the resignation and notify the writer of the same that it had been accepted is unnecessary, as both facts are embraced in the findings of the court below; nor was any attempt made in argument to deny that the evidence justified the findings.

Officers of the kind are nominated by the President and confirmed by the Senate; and if the petitioner ceased to be such an officer when notified that his resignation had been accepted, it requires no argument to show that nothing could reinstate him in the office short of a new nomination and confirmation. Prior to the act of the 13th of July, 1866, the President could dismiss an officer in the military or naval service without the concurrence of the Senate, but he never could nominate and appoint one without the advice and consent of the senate, as required by the Constitution. *Dubarry's Case*, 4 Op. Att'y-Gen. 603; 14 Stat. 92.

Since the passage of that act, the President cannot dismiss such an officer in time of peace, and certainly no vacancy in such an office can be filled without the advice and consent of the Senate; from which it follows that the opinion of the Attorney-General, that the subsequent action of the President did not restore the petitioner to the military service, is correct. 12 Stat. 316.

Concede that, and it follows that the office became vacant when the incumbent was notified that his resignation had been accepted, and that the new appointment was in all respects regular when confirmed by the Senate.

Decided support to that conclusion, if any be needed, is derived from the subsequent findings of the court below, from which it appears that the petitioner, on the 19th of February, subsequent to the confirmation of the new appointee to the office in question, enlisted in the marine corps, and that he remained in that situation until his compensation amounted to \$2,344; and that he was subsequently appointed a

clerk in the Treasury Department, and that he served there in different capacities until his compensation amounted to more than \$2,000 in addition to what he had previously received for his services in the marine corps.

For these reasons the court is of the opinion that the subsequent action of the President did not restore the petitioner to the military service, and that his claim was rightly rejected.

Judgment affirmed.

3. BLAKE v. UNITED STATES.

(Supreme Court of the United States, 1880. 103 U. S. 227, 26 L. Ed. 462.)

Appeal from the Court of Claims.

This suit was instituted in the Court of Claims, by Blake, to recover the amount claimed to be due him, by way of salary as a post-chaplain in the army, from April 28, 1869, to May 14, 1878.

The court below found that, under date of Dec. 24, 1868, Blake, a post-chaplain in the army, stationed at Camp McDowell, Arizona, addressed to the Secretary of War a communication, in which he complained of unjust treatment to which, during several years, he had been subjected by various officers. He asked for the fullest and most thorough investigation of the facts, and concluded: "But if this cannot be done, then I wish to tender to the Honorable the Secretary of War my resignation as a chaplain of the army, and to lay the facts, which I have for years been accumulating with the greatest care, before the church and the country at large." After this letter came to the hands of the post commandant, his attention was called to the mental condition of Blake, and it was suggested that the latter was not responsible for his act in writing the letter. It was, therefore, retained until Dec. 31, 1868, when it was forwarded by the commandant with an indorsement recommending the acceptance of the resignation, and saying, among other things, that "the tenor of this and other communications forwarded will, no doubt, convince the department commander of his utter uselessness in the position he holds."

The letter of Dec. 24, 1868, was forwarded through the district and department headquarters, and, finally, through the headquarters of the military division of the Pacific, to the Secretary of War, by whom it was transmitted to the President, who accepted the resignation, to take effect March 17, 1869. Each of the commanding officers through whose office the letter passed recommended the acceptance of the resignation.

On March 28, 1869, Blake telegraphed to the delegate in Congress from Arizona, stating that he did not intend to resign, and that if his letter was construed as a resignation, to withdraw it immediately. When the Secretary of War was informed of the telegram, he stated that the resignation had been accepted and was beyond recall.

Blake, having received official notice of such acceptance, addressed the following letter to the Secretary of War:

"Napa City, Cal., April 27, 1869.

"Hon. John A. Rawlins,

"Secretary of War, Washington, D. C.:

"Dear sir.—To my great surprise I was yesterday informed, thro' H'd Q'rs Dep't of California, that my 'resignation' as post-chaplain, U. S. Army, 'had been accepted by the President,' 'to take effect March 17, 1869.'

"As I am not aware of having at any time resigned my commission, and as I am now in a state of feeble health, caused by efficient services in the line of duty in 1863, 1864, and since, I beg that the favorable reconsideration of the President may be given to my case, and that I may be ordered before a retiring board for examination, and to duty if fit for it.

"Justice to the service, no less than to myself and family, after eight years of devoted labors, will not permit me to be silent in view of the wrongs done me at Camp McDowell, A. T., and I am confident that you will not allow me to suffer wrongfully.

"I have the honor to remain, with great respect, your ob'd't servant,

"[Signed]

Charles M. Blake,

"(Late) Post Chaplain, U. S. A."

This letter was referred to the adjutant-general, who returned it with this indorsement:

"Respectfully returned to the Secretary of War, with the paper on which the resignation of Chaplain Blake was accepted. Chaplain Blake appears not to be of sane mind.

"E. D. Townsend, Adj.-Genl."

On July 7, 1870, the President nominated to the Senate six persons to be post-chaplains in the army, to rank from July 2, 1870; among them was that of "Alexander Gilmore, of New Jersey, vice Blake, resigned." Gilmore's nomination was confirmed July 12, 1870, and on the 14th of that month he was commissioned as post-chaplain, to rank as such from July 2, 1870. He has since regularly received his salary and performed his duties as such post-chaplain.

The court further found, that for some time prior to, and on, Dec. 24, 1868, Blake had been suffering from physical disease and mental prostration; that in the light of subsequent events "there can be no doubt he was then insane;" that he was, at times, irritable and incoherent, manifesting egotism and suspicion of his superiors; that not until after the above date were these symptoms developed to such an extent as necessarily to induce persons who came in contact with him to believe he was mentally incapable of acting with sound reasoning purpose; also that, at the date of the telegram to the delegate from Arizona, he was "totally unqualified for business," and at the date of the letter of April 27, 1869, "he was not of sound mind."

It also found that the insanity of Blake continued until about the year 1874.

On Sept. 28, 1878, the President made the following order:

"Executive Mansion, Sept. 28, 1878.

"It appearing from the evidence, and from the reports of the surgeon-general of the army and the superintendent of the government hospital for the insane, that Chaplain Blake was insane at the time he

tendered his resignation, it is held that said resignation was and is void, and the acceptance thereof is set aside. Chaplain Blake will be ordered to duty, and paid from the date of the resignation of post-chaplain Preston Nash, to wit, May 14, 1878, by which resignation a vacancy was created, which has not been filled. The claim of Chaplain Blake for pay from the date of his resignation to May 14, 1878, during which his successor held the office, discharged its duties, and received pay, is not decided, but is left for the decision of the court, where it is understood to be now pending.

"R. B. Hayes."

Oct. 2, 1878, the following order was issued by direction of the general of the army:

"Headquarters of the Army,
"Adjutant-General's Office,
"Washington, Oct. 2, 1878.

"1. It appearing from the evidence presented, and from the reports of the surgeon-general of the army, and the superintendent of the government hospital for the insane, that Post-Chaplain Charles M. Blake, U. S. Army, was insane at the time he tendered his resignation, December 24, 1868, said resignation is, by direction of the President, declared void, and the acceptance of the same in letter from this office, dated March 17, 1869, as announced in Special Orders No. 62, March 17, 1869, from this office, is set aside.

"Chaplain Blake is restored to the list of post-chaplains of the army with his original date of rank, and with pay from May 14, 1878, since which date a vacancy in that grade has existed. He will report in person to the commanding officer, department of Arizona, for assignment to duty. * * *

"By command of General Sherman.

"[Signed] E. D. Townsend, Adjutant-General."

The court below dismissed the petition, whereupon Blake appealed to this court.

Mr. Justice HARLAN delivered the opinion of the court.

The claim of Blake is placed upon the ground that before, at the date of, and after the letter addressed to the Secretary of War, which was treated as his resignation, he was insane in a sense that rendered him irresponsible for his acts, and consequently that his supposed resignation was inoperative and did not have the effect to vacate his office. Did the appointment of Gilmore, by and with the advice and consent of the Senate, to the post-chaplaincy held by Blake, operate, *proprio vigore*, to discharge the latter from the service, and invest the former with the rights and privileges belonging to that office? If this question be answered in the affirmative, it will not be necessary to inquire whether Blake was, at the date of the letter of Dec. 24, 1868, in such condition of mind as to enable him to perform, in a legal sense, the act of resigning his office; or, whether the acceptance of his resignation, followed by the appointment of his successor, by the President, by and with the advice and consent of the Senate, is not, in view of the relations of the several departments of the government to each other, conclusive, in this collateral proceeding, as to the fact of a valid effectual resignation.

From the organization of the government, under the present Constitution, to the commencement of the recent war for the suppression of the rebellion, the power of the President, in the absence of statutory regulations, to dismiss from the service an officer of the army or navy, was not questioned in any adjudged case, or by any department of the government.

Upon the general question of the right to remove from office, as incident to the power to appoint, *Ex parte Hennen* (13 Pet. 259, 10 L. Ed. 138) is instructive. That case involved the authority of a district judge of the United States to remove a clerk and appoint some one in his place.

The court, among other things, said: "All offices, the tenure of which is not fixed by the Constitution or limited by law, must be held either during good behavior, or (which is the same thing in contemplation of law) during the life of the incumbent, or must be held at the will and discretion of some department of the government, and subject to removal at pleasure.

"It cannot for a moment be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment. This power of removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained in the early history of this government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate; and the great question was whether the removal was to be by the President alone, or with the concurrence of the Senate, both constituting the appointing power. No one denied the power of the President and Senate jointly to remove, where the tenure of the office was not fixed by the Constitution; which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted, as the practical construction of the Constitution, that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution." 1 Kent, Com. 309; 2 Story, Const. (4th ed.), sects. 1537-1540, and notes; 2 Marshall, *Life of Washington*, 162; Sergeant, *Const. Law*, 372; Rawle, *Const.*, c. 14.

During the administration of President Tyler, the question was propounded by the Secretary of the Navy to Attorney-General Legare, whether the President could strike an officer from the rolls, without a trial by a court-martial, after a decision in that officer's favor by a court of inquiry ordered for the investigation of his conduct. His response was: "Whatever I might have thought of the power of removal from office, if the subject were *res integra*, it is now too late to dispute the settled construction of 1789. It is according to that construction, from the very nature of executive power, absolute in the President, subject only to his responsibility to the country (his constituents) for a breach of such a vast and solemn trust. 3 Story, *Com. Const.* 397, sect. 1538. It is obvious that if necessity is a sufficient ground

for such a concession in regard to officers in the civil service, the argument applies a *multo fortiori* to the military and naval departments. * * * I have no doubt, therefore, that the President had the constitutional power to do what he did, and that the officer in question is not in the service of the United States." The same views were expressed by subsequent attorneys-general. 4 Opin. 1; 6 id. 4; 8 id. 233; 12 id. 424; 15 id. 421.

In *Du Barry's Case* (4 Op. Atty. Gen. 612) Attorney-General Clifford said that the attempt to limit the exercise of the power of removal to the executive officers in the civil service found no support in the language of the Constitution nor in any judicial decision; and that there was no foundation in the Constitution for any distinction in this regard between civil and military officers.

In *Lansing's Case* (6 Op. Atty. Gen. 4) the question arose as to the power of the President, in his discretion, to remove a military storekeeper. Attorney-General Cushing said: "Conceding, however, that military storekeepers are officers, or, at least, quasi officers, of the army, it does not follow that they are not subject to be deprived of their commission at the will of the President.

"I am not aware of any ground of distinction in this respect, so far as regards the strict question of law, between officers of the army and any other officers of the government. As a general rule, with the exception of judicial officers only, they all hold their commissions by the same tenure in this respect. Reasons of a special nature may be deemed to exist why the rule should not be applied to military in the same way as it is to civil officers, but the legal applicability to both classes of officers is, it is conceived, the settled construction of the Constitution. It is no answer to this doctrine to say that officers of the army are subject to be deprived of their commissions by the decision of a court-martial. So are civil officers by impeachment. The difference between the two cases is in the form and mode of trial, not in the principle, which leaves unimpaired in both cases alike the whole constitutional power of the President.

"It seems unnecessary in this case to recapitulate in detail the elements of constitutional construction and historical induction by which this doctrine has been established as the public law of the United States. I observe only that, so far as regards the question of abstract power, I know of nothing essential in the grounds of legal conclusion, which have been so thoroughly explored at different times in respect of civil officers, which does not apply to officers of the army."

The same officers, subsequently, when required to consider this question, said that "the power has been exercised in many cases with approbation, express or implied, of the Senate, and without challenge by any legislative act of Congress. And it is expressly reserved in every commission of the officers, both of the navy and army." 8 Opin. 231.

Such was the established practice in the Executive Department, and such the recognized power of the President up to the passage of the act of July 17, 1862, c. 200. (12 Stat. 596), entitled "An Act to define the pay and emoluments of certain officers of the army, and for other purposes," the seventeenth section of which provides that "the President

- of the United States be, and hereby is, authorized and requested to dismiss and discharge from the military service, either in the army, navy, marine corps, or volunteer force, any officer for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismissal would promote, the public service."

In reference to that act Attorney-General Devens (15 Opin. 421) said, with much reason, that so far as it "gives authority to the President, it is simply declaratory of the long-established law. It is probable that the force of the act is to be found in the word 'requested,' by which it was intended to re-enforce strongly this power in the hands of the President at a great crisis of the State."

The act of March 3, 1865, c. 79 (13 Stat. 489), provides that, in case any officer of the military or naval service, thereafter dismissed by the authority of the President, shall make application in writing for a trial, setting forth, under oath, that he has been wrongfully and unjustly dismissed, "the President shall, as soon as the necessities of the service may permit, convene a court-martial to try such officer on the charges on which he was dismissed. And if such court-martial shall not award dismissal or death as the punishment of such officer, the order of dismissal shall be void. And if the court-martial aforesaid shall not be convened for the trial of such officer within six months from the presentation of his application for trial, the sentence of dismissal shall be void."

Thus, so far as legislative enactments are concerned, stood the law in reference to dismissals, of army or naval officers, by the President, until the passage of the army appropriation act of July 13, 1866, c. 176 (14 Stat. 92), the fifth section of which is as follows:

"That section seventeen of an act, entitled 'An Act to define the pay and emoluments of certain officers of the army,' approved July seventeenth, eighteen hundred and sixty-two, and a resolution, entitled 'A Resolution to authorize the President to assign the command of troops in the same field, or department, to officers of the same grade, without regard to seniority,' approved April fourth, eighteen hundred and sixty-two, be, and the same are, hereby repealed. And no officer in the military or naval service shall, in time of peace, be dismissed from the service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."

Two constructions may be placed upon the last clause of that section without doing violence to the words used. Giving them a literal interpretation, it may be construed to mean, that although the tenure of army and naval officers is not fixed by the Constitution, they shall not, in time of peace, be dismissed from the service, under any circumstances, or for any cause, or by any authority whatever, except in pursuance of the sentence of a court-martial to that effect, or in commutation thereof. Or, in view of the connection in which the clause appears,—following, as it does, one in the same section repealing provisions touching the dismissal of officers by the President alone, and to assignments, by him, of the command of troops, without regard to seniority of officers,—it may be held to mean, that, whereas, under the act of July 17, 1862, as well as before its passage, the President, alone, was authorized to dismiss an army or naval officer from the service

for any cause which, in his judgment, either rendered such officer unsuitable for, or whose dismissal would promote, the public service, he alone shall not, thereafter, in time of peace, exercise such power of dismissal, except in pursuance of a court-martial sentence to that effect, or in commutation thereof.

Although this question is not free from difficulty, we are of opinion that the latter is the true construction of the act. That section originated in the Senate as an amendment of the army appropriation bill which had previously passed the House of Representatives. Cong. Globe, 39th Congress, pp. 3254, 3405, 3575, and 3589. It is supposed to have been suggested by the serious differences existing, or which were apprehended, between the legislative and executive branches of the government in reference to the enforcement, in the States lately in rebellion, of the reconstruction acts of Congress. Most, if not all, of the senior officers of the army enjoyed, as we may know from the public history of that period, the confidence of the political organization then controlling the legislative branch of the government. It was believed that, within the limits of the authority conferred by statute, they would carry out the policy of Congress, as indicated in the reconstruction acts, and suppress all attempts to treat them as unconstitutional and void, or to overthrow them by force. Hence, by way of preparation for the conflict then apprehended between the executive and legislative departments as to the enforcement of those acts, Congress, by the fifth section of the act of July 13, 1866, repealed not only the seventeenth section of the act of July 17, 1862, but also the resolution of April 4, 1862, which authorized the President, whenever military operations required the presence of two or more officers of the same grade, in the same field or department, to assign the command without regard to seniority of rank. In furtherance, as we suppose, of the objects of that legislation, was the second section of the army appropriation act of March 2, 1867, c. 170 (14 Stat. 486), establishing the headquarters of the general of the army at Washington, requiring all orders and instructions relating to military operations issued by the President or Secretary of War to be issued through that officer, and in case of his inability, through the next in rank, and declaring that the general of the army "shall not be removed, suspended, or relieved from command, or assigned to duty elsewhere than at said headquarters, except at his own request, without the previous approval of the Senate, and any orders or instructions relating to military operations issued contrary to the requirements of this section shall be null and void; and any officer who shall issue orders or instructions contrary to the provisions of this section shall be deemed guilty of a misdemeanor in office," &c.

Our conclusion is that there was no purpose, by the fifth section of the act of July 13, 1866, to withdraw from the President the power, with the advice and consent of the Senate, to supersede an officer in the military or naval service by the appointment of some one in his place. If the power of the President and Senate, in this regard, could be constitutionally subjected to restrictions by statute (as to which we express no opinion), it is sufficient for the present case to say that Congress did not intend by that section to impose them. It is, in substance

and effect, nothing more than a declaration, that the power theretofore exercised by the President, without the concurrence of the Senate, of summarily dismissing or discharging officers of the army or the navy, whenever in his judgment the interest of the service required it to be done, shall not exist, or be exercised, in time of peace, except in pursuance of the sentence of a court-martial, or in commutation thereof. There was, as we think, no intention to deny or restrict the power of the President, by and with the advice and consent of the Senate, to displace them by the appointment of others in their places.

It results that the appointment of Gilmore, with the advice and consent of the Senate, to the office held by Blake, operated in law to supersede the latter, who thereby, in virtue of the new appointment, ceased to be an officer in the army from and after, at least, the date at which that appointment took effect,—and this, without reference to Blake's mental capacity to understand what was a resignation. He was, consequently, not entitled to pay as post-chaplain after July 2, 1870, from which date his successor took rank. Having ceased to be an officer in the army, he could not again become a post-chaplain, except upon a new appointment, by and with the advice and consent of the Senate. *Mimmack v. United States*, 97 U. S. 426, 24 L. Ed. 1067.

As to that portion of the claim covering the period between April 28, 1869, and July 2, 1870, it is only necessary to say that, even were it conceded that the appellant did not cease to be an officer in the army by reason of the acceptance of his resignation, tendered when he was mentally incapable of understanding the nature and effect of such an act, he cannot recover in this action. His claim for salary during the above period accrued more than six years, and the disability of insanity ceased more than three years before the commencement of this action. The government pleads the Statute of Limitations, and it must be sustained. Congress alone can give him the relief which he seeks. Judgment affirmed.

4. CRENSHAW v. UNITED STATES.

(Supreme Court of the United States, 1890. 134 U. S. 99, 10 Sup. Ct. 431, 33 L. Ed. 825.)

Appeal from the Court of Claims.

This is an action brought by the appellant, James D. Crenshaw, in the court of claims, for the purpose of recovering an alleged balance of \$3,763.66 due him on account of salary as a midshipman in the United States Navy. The court of claims dismissed the appellant's petition, (24 Ct. Cl. 57,) and an appeal from that judgment brings the case here.

The material facts in the case are as follows: In September, 1877, the appellant was appointed a cadet midshipman at the Naval Academy. At that time, the provisions of the Revised Statutes in force and pertinent to this inquiry were as follows:

"Sec. 1520. The academic course of cadet midshipmen shall be six years.

"Sec. 1521. When cadet midshipmen shall have passed successfully the graduating examination at the academy, they shall receive

appointments as midshipmen, and shall take rank according to their proficiency, as shown by the order of their merit at date of graduation."

"Sec. 1556. The commissioned officers and warrant officers on the active list of the navy of the United States, and the petty officers, seamen, * * * shall be entitled to receive annual pay at the rates herein stated after their respective designations: * * * Midshipmen, after graduation, when at sea, one thousand dollars; on shore duty, eight hundred dollars; on leave, or waiting orders, six hundred dollars. Cadet midshipmen, five hundred dollars."

"Sec. 1229. The president is authorized to drop from the rolls of the army, for desertion, any officer who is absent from duty three months without leave, and no officer so dropped shall be eligible for reappointment. And no officer in the military or naval service shall, in time of peace, be dismissed from service except upon, and in pursuance of, the sentence of a court-martial to that effect, or in commutation thereof."

The appellant accepted the appointment, and entered on his studies at the academy. He completed the course of four years, and, after passing a successful examination received a certificate from the academic board in the following words, to-wit: "This certifies that Cadet Midshipman James D. Crenshaw has completed the prescribed course of study at the United States Naval Academy, and has successfully passed the required examination before the academic board preparatory to the two-years course afloat. June 10, 1881."

On the 25th of August following, appellant was ordered to sea by the navy department, and directed to report for duty on board the steamer Pensacola. This he did. While he was serving on that steamer, under the aforesaid order, congress passed an act, approved August 5, 1882, being the naval appropriation act, in which occurs this proviso: "That hereafter there shall be no appointments of cadet midshipmen or cadet engineers at the Naval Academy, but, in lieu thereof, naval cadets shall be appointed from each congressional district, and at large, as now provided by law for cadet midshipmen, and all the undergraduates at the Naval Academy shall hereafter be designated and called 'naval cadets;' and from those who successfully complete the six-years course, appointments shall hereafter be made as it is necessary to fill vacancies in the lower grades of the line and engineer corps of the navy, and of the marine corps: and provided further, that no greater number of appointments into these grades shall be made each year than shall equal the number of vacancies which has occurred in the same grades during the preceding year; such appointments to be made from the graduates of the year, at the conclusion of their six-years course, in the order of merit, as determined by the academic board of the Naval Academy; the assignment to the various corps to be made by the secretary of the navy upon the recommendation of the academic board. But nothing herein contained shall reduce the number of appointments from such graduates below ten in each year, nor deprive of such appointment any graduate who may complete the six-years course during the year eighteen hundred and eighty-two. And, if

there be a surplus of graduates, those who do not receive such appointment shall be given a certificate of graduation, an honorable discharge, and one year's sea pay, as now provided by law for cadet midshipmen," etc. 22 St. 284, 285.

As stated above, this statute was passed while appellant was engaged in his service on the Pensacola. He continued on that vessel until the 14th of March, 1883, when he was ordered to report to the superintendent of the Naval Academy for examination. He proceeded to the academy, passed his final examination successfully, and, on the 15th of June, 1883, received from the academic board his certificate of graduation, reciting that "We, the academic board of the United States Naval Academy, having thoroughly examined Naval Cadet James D. Crenshaw on all subjects, theoretical and practical, taught at this institution, and having found him proficient in each, do hereby, in conformity with the law, grant to him this certificate of graduation. June 15, 1883."

On the 23d of June following he received this order: "Navy Department, Bureau of Navigation and Office of Detail, Washington, June 23, 1883. Sir: You are hereby detached from the Naval Academy. Proceed home, and regard yourself waiting orders. By direction of the secretary of the navy. Respectfully, J. E. Waller, Chief of Bureau."

On the 26th of the same month an order as follows was issued: "Sir: Having successfully completed your six years' course at the United States Naval Academy, and having been given a certificate of graduation by the academic board, but not being required to fill any vacancy in the service happening during the year preceding your graduation, you are hereby discharged from the 30th of June, 1883, with one year's sea pay as prescribed by law for cadet midshipmen, in accordance with the provisions of the act approved August 5, 1882. Respectfully, W. E. Chandler, Secretary of the Navy. Naval Cadet James D. Crenshaw, U. S. Navy."

Since the date of that order, appellant has not been called on to do duty, and has not received any pay except that credited on his claim. In this state of the case, he claims that he is still a midshipman in the naval service, and, as such, entitled to pay. This claim is based upon the following propositions:

(1) That when he accepted the appointment of cadet midshipman he became an officer of the navy, and, as such, entitled to the benefits of section 1229, and article 36, § 1624, (which is to the same effect,) of the Revised Statutes; that such acceptance constituted a statutory contract with the United States, based on a valuable consideration, under which he is entitled to hold the office for life, unless removed by sentence of a court-martial, or in commutation thereof.

(2) That he was not, therefore, discharged by competent authority, because, first, since the re-enactment by congress, in 1874, of section 1229 and article 36 of section 1624 of the Revised Statutes, neither congress, the secretary of the navy, nor any department of the government, is competent, in time of peace, to discharge an officer from the naval service.

(3) That, independently of the act of July 13, 1866, (14 St. 92; section 1229, and art. 36 of section 1624, aforesaid,) the act of 1882 is unconstitutional, as applied to him; for the reason that he held an office by contract with the United States, and was entitled on graduation to be a midshipman to serve for life, or during good behavior.

(4) That not only was the act of August 5, 1882, inoperative, as to him, for the reason stated; but also for the further reason that to apply it to his class would be to make congress appoint to the office of naval cadet all such students as were in his situation; but that, while congress had the power, under the constitution, to create the office, it did not have the power to designate the officers,—that being the constitutional duty of the executive.

And (5) that the case of appellant did not fall within the terms of the act of 1882; that he was not, at the date of its passage, an undergraduate of the academy, but had graduated; and that therefore his discharge was not authorized by that act.

Mr. Justice LAMAR, after stating the facts as above, delivered the opinion of the court.

The primary question in this case—one which underlies the first, second, and third of appellant's propositions, stated above—is, whether an officer appointed for a definite time, or during good behavior, had any vested interest or contract right in his office of which congress could not deprive him.

The question is not novel. There seems to be but little difficulty in deciding that there was no such interest or right. The question was before this court in *Butler v. Pennsylvania*, 10 How. 402, 13 L. Ed. 472. In that case, Butler and others, by virtue of a statute of the state of Pennsylvania, had been appointed canal commissioners for a term of one year, with compensation at four dollars per diem, but during their incumbency another statute was passed, whereby the compensation was reduced to three dollars; and it was claimed their contract rights were thereby infringed. The court drew a distinction between such a situation and that of a contract, by which "perfect rights, certain definite, fixed, private rights of property, are vested." It said: "These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all; and, from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated, as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted during the continuance of the particular agency may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental.

and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such a principle would arrest, necessarily, everything like progress or improvement in government; or, if changes should be ventured upon, the government would have to become one great pension establishment, on which to quarter a host of sinecures. * * * It follows, then, upon principle, that in every perfect or competent government there must exist a general power to enact and to repeal laws, and to create and change or discontinue the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic, and for the safety of the individuals of the community. It is true that this power, or the extent of its exercise, may be controlled by the higher organic law or constitution of the state, as is the case in some instances in the state constitutions, and as is exemplified in the provision of the federal constitution relied on in this case by the plaintiffs in error, and in some other clauses of the same instrument; but, where no such restriction is imposed, the power must rest in the discretion of the government alone. * * * We have already shown that the appointment to and the tenure of an office created for the public use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the constitution relied on by the plaintiffs in error,—do not come within the import of the term ‘contracts,’ or, in other words, the vested, private, personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon, to foster and promote the general good,—functions, therefore, which governments cannot be presumed to have surrendered, if indeed they can, under any circumstances, be justified in surrendering them.”

The case of *Newton v. Commissioners*, 100 U. S. 548, 25 L. Ed. 710, is in point. That was a controversy over the projected removal of a county-seat; and the statute relied on by the objectors provided that, before the seat of justice should be considered as permanently established at the town of Canfield, the citizens thereof should do certain things, all of which were admitted to have been duly done. The objectors therefore claimed a contract right that the county-seat should remain at Canfield. This court said: “The legislative power of a state, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary, or change the mode of compensation. The police power of the states, and that with respect to municipal corporations, and to many other things that might be named, are of the same absolute character;” citing *Cooley*, Const. Lim. 232, 342; *The Regents v. Williams*, 9 Gill & J. (Md.) 371, 31 Am. Dec. 72. “In all these cases there can be no contract, and no irrevocable law, because they are ‘governmental subjects,’ and hence within the category before stated. They involve public interest, and legislative acts concerning them are necessarily public laws. Every succeed-

ing legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment,—neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so, in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.”

In *Stone v. Mississippi*, 101 U. S. 814, 820, 25 L. Ed. 1079, considering the power of a legislature to grant an irrepealable charter, for a consideration, to a lottery company, the court said: “The power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which from the very nature of things, must ‘vary with varying circumstances.’” See, also, *Hall v. Wisconsin*, 103 U. S. 5, 26 L. Ed. 302; *U. S. v. Fisher*, 109 U. S. 143, 3 Sup. Ct. 154, 27 L. Ed. 885. Nor is the holding of this court singular. Numerous decisions to the same effect are to be found in the state courts. *People v. Morris*, 13 Wend. (N. Y.) 325; *Com. v. Bacon*, 6 Serg. & R. (Pa.) 322; *Com. v. Mann*, 5 Watts & S. (Pa.) 418; *Hyde v. State*, 52 Miss. 665; *State v. Smedes*, 26 Miss. 47; *Turpen v. Board, etc.*, 7 Ind. 172; *Haynes v. State*, 3 Humph. (Tenn.) 480, 39 Am. Dec. 187; *Benford v. Gibson*, 15 Ala. 521.

In *Blake v. U. S.*, 103 U. S. 227, 26 L. Ed. 462, the fact is adverted to, and the opinion of the attorney general in *Lansing’s Case*, 6 Ops. Atty. Gen. 4, quoted approvingly, to the effect that in this respect of official tenure there is no difference in law between officers in the army and other officers of the government.

Applying the above principles, it remains to say that we know of no instance in which their assertion is more imperatively demanded by the public welfare than in this case, and such others as this. If the position taken by the appellant is correct, then a logical and unavoidable result is, that our country, if ever we are so unfortunate as to be again involved in war, will be compelled, after the treaty of peace, to maintain the entire official force of the army and navy, and a host of sinecurists, in full pay so long as they shall live,—either that, or to disband the army and navy before the peace shall be made; even this wholly inadmissible alternative being legally possible from one of appellant’s positions. It is impossible to believe that such a condition of affairs was ever contemplated by the framers of our organic or statute law. The effect of the authorities cited above is in no respect modified by section 1229 or by article 36 of section 1624 of the Revised Statutes. In the first place, if it were granted that those sections mean what appellant claims for them,—if they

mean beyond question that one appointed as a cadet shall never be dismissed by authority of either the executive or the legislature, or by both in conjunction,—yet that fact would make no difference. The great question of protection to contract rights and vested interests, which forms such an interesting and important feature of our constitutional law, is not dominated by the turn of a phrase. Our courts, both state and national, look on these questions through the form to the substance of things; and, in substance, a statute under which one takes office, and which fixes the term of office at one year, or during good behavior, is the same as one which adds to those provisions the declaration that the incumbent shall not be dismissed therefrom. Whatever the form of the statute, the officer under it does not hold by contract. He enjoys a privilege revocable by the sovereignty at will, and one legislature cannot deprive its successor of the power of revocation. *Butler v. Pennsylvania*, supra; *Stone v. Mississippi*, supra; *Cooley*, *Const. Lim.* 283; *U. S. v. McDonald*, 128 U. S. 471, 473, 9 Sup. Ct. 117, 32 L. Ed. 506.

In the second place, section 1229 and article 36 of section 1624 of the Revised Statutes are a reproduction in the revision of the act of July 13, 1866, section 5, supra; and in *Blake v. U. S.*, supra, the court decided that that act only operated to withdraw from the president the power previously existing in him of removing officers at will, and without the concurrence of the senate, and that there was no intention to withdraw from him the power to remove with the advice and concurrence of the senate. If that construction of the statute be correct (and we see no cause for altering our view), it necessarily follows that it was not intended to place an officer where he never before had been,—beyond the power of congress to make any provision for his removal, even by the executive who appointed him. It is claimed, however, that the construction so given to the act of 1866 was induced by the consideration of certain other statutes in *pari materia*, and that the reintroduction of it in the revision, unaccompanied by those other statutes, would render that construction inapplicable now. We do not think so. We have already considered the act of 1866 in its historical relations, and from the circumstances of its enactment deduced its meaning. When it was re-enacted with all other statutes of general interest, the political exigency which furnished the primary motive for its re-enactment, had drifted away with the lapse of time; but we do not think it can avail to give to a statute which, after all, is but a re-enactment in the exact language of the original act, a meaning almost directly the reverse of that given to the original act. To give such effect to the action of congress in codifying the statutes would go far to subvert all decisions, and introduce chaos into our jurisprudence.

Thus far we have preferred to decide the case upon the broad grounds above stated, and therefore considered it as if the term of office enjoyed by the appellant was what he claims it to have been,—a term for life. In fact, however, even if that were true as to other officers, it was not true as to him. The statute applicable to his case is section 1520 of the Revised Statutes, which fixes the academic course at six years; and when he entered the service, under the reg-

ulations in such cases provided, he executed a bond to serve for eight years, unless discharged by competent authority,—thus recognizing his liability to be discharged.

As to the fourth proposition of appellant, that, in enacting the statute of 1882, congress assumed the power of appointment which belongs to the executive, we do not so regard the act. Congress did not thereby undertake to name the incumbent of any office. It simply changed the name, and modified the scope of the duties. This, we think, it had the power to do. We think, too, that the appellant came within the terms of the act of 1882. There is a very plain distinction between this case and that of a cadet engineer, fully explained in *U. S. v. Redgrave*, 116 U. S. 474, 6 Sup. Ct. 444, 29 L. Ed. 697. The statute in express terms provides that "the academic course of cadet midshipmen shall be six years." If the navy department had assumed to make any regulations by which the final graduation shall take place in less time, such regulations would have been void. But it did not so assume. It arranged for a two-years course afloat as a part of the academic course, and exacted a preliminary examination to test the cadet's qualifications therefor. But the cadet afloat was a member of the academy. He still was subject to a final examination at that institution, and, without such examination successfully sustained, never became a graduate. He was not so denominated until then, either in the Naval Register or elsewhere; and it was not until that final test had been sustained that, either by the practice of the academy or by the provision of the statute, he did or could receive his certificate of graduation.

The judgment of the court of claims is affirmed.

5. SCHWENK v. WYCKOFF.

(Court of Errors and Appeals of New Jersey, 1890. 46 N. J. Eq. 560, 20 Atl. 259, 9 L. R. A. 221, 19 Am. St. Rep. 438.)

Appeal from court of chancery.

REED, J. The right of the appellee, who was the complainant below, to the relief for which she prays, rests upon an assignment made to her husband by the defendant. The subject-matter which the assignment was supposed to operate upon was the unearned pay of the defendant, to become due to him as a retired officer of the United States army.

In consideration of the cause we meet at the outset a difficulty which lies at the root of the complainant's case. It exists in the shape of an objection interposed by the defendant that this assignment purports to transfer a chose in action belonging to a class which are not assignable, or what in effect produces the same result, the assignment of which the courts will not enforce or recognize. The rule is established in the English courts that the unearned salary or emolument of an officer which may become payable during his life is incapable of assignment. This restriction upon the general power to dispose of rights having a potential existence is put upon the ground that the recognition of

such assignments would operate prejudicially upon the public service. The considerations which led to this judicial result were in substance the following: It was apparent that the salary or remuneration incident to a public office, as a rule, was essential to a decent and comfortable support of the incumbent. If the officer should be deprived of this support, there would arise a hazard of his being driven to an inappropriate meanness of living, of his being harassed by the worry of straitened circumstances, and tempted to engage in unofficial labor, and of the likelihood of his falling off in that official interest and vigilance which the expectation of pay keeps alive. It was because of these probable consequences that the courts refused to countenance any act or proceeding which might result in stripping the officer of his anticipated reward. The cases in which this question has been mooted, and the foregoing rule established, in the English courts, are the following: *Flarty v. Odlum*, 3 Term R. 681; *Barwick v. Reed*, 1 H. Bl. 627; *Arbuckle v. Cowtan*, 3 Bos. & P. 328; *Davis v. Marlborough*, 1 Swanst. 79; *Lidderdale v. Montrose*, 4 Term R. 248; *Stone v. Lidderdale*, 2 Anstr. 533; *Wells v. Foster*, 8 Mees. & W. 149; *Palmer v. Bate*, 2 Brod. & B. 673.

In the case of *Flarty v. Odlum*, 3 Term R. 681, it was held by the court of king's bench that this rule was applicable to the assignment of half-pay by an officer of the British army. It was ruled that future accruing payments did not pass to an assignee appointed under proceedings against an insolvent officer taken for the benefit of his creditors. Afterwards, in the case of *Lidderdale v. Duke of Montrose*, 4 Term R. 249, the validity of a voluntary assignment of the half-pay of an officer came before the same court, and it was held that there was no distinction to be made between a voluntary assignment and an assignment, as in the last-mentioned case, under the insolvent debtor's act, and so the voluntary assignment was also held to be void. The same dispute, under the name of *Stone v. Lidderdale*, was shifted into the court of exchequer, and by that court it was remarked that half-pay was granted for the purpose of keeping experienced officers in such a situation as not to be compelled to turn themselves to other pursuits, or to be by other circumstances reduced to extreme poverty. The assignment was therefore held to be void. 2 Anstr. 533. Since the decision of these causes the nullity of an assignment of unearned half-pay by an officer has been repeatedly recognized. The remarks of Lord Alvanley in *Arbuckle v. Cowtan*, *supra*, and of Baron Parke in *Wells v. Foster*, *supra*, display an understanding in the English courts that by the case of *Flarty v. Odlum* this question had been definitely set at rest.

In this country there are two cases in which the assignment of a portion of a salary to become due had been held valid. One case is *Brackett v. Blake*, 7 Metc. (Mass.) 335, 41 Am. Dec. 442, in which case it was held that the unearned salary of a city marshal was capable of assignment. It is quite remarkable that the only question discussed in the opinion of Chief Justice Shaw in that case was whether the anticipated salary was such a possibility, coupled with an interest as to be capable of assignment. Upon the court's concluding that it was such

an interest, the assignment was sustained, without a word in respect to the point raised in the brief of counsel that the assignment was opposed to public policy. This question seems to have been entirely overlooked in the decision of that case.

There are two subsequent cases in Massachusetts sometimes cited as sustaining the same doctrine; but both these cases, namely *Mulhall v. Quinn*, 1 Gray (Mass.) 105, 61 Am. Dec. 414, and *Macomber v. Doane*, 2 Allen (Mass.) 541, as decided, involve only the question of the assignability of wages to become due upon contracts for services rendered. The second, and only other, case in which the assignment of the prospective pay of a public officer has been the subject of judicial approval, is that of *Bank v. Hastings*, 15 Wis. 78. This case involved the assignment of the future salary of a judge. In delivering the opinion the judge remarked that it had not been contended that the doctrine of the English cases holding that assignments of the pay of officers in the public service, judges' salaries, pensions, etc., were void, was applicable to the condition of society, or to the principles of law or public policy, of this country. The soundness of the rule laid down by the English cases, however, was not impugned. Nor was it explained in what way the propriety of supporting this rule of public policy ceased under our political or judicial system. Nor does the possibility of any rational explanation seem clear.

The object of the rule in both countries is to secure the most efficient service to the public by those who are appointed or elected to perform public duties. So long as there are public officers who are remunerated for their services, the same conditions exist in both countries which renders the stripping of such officer of his expectation of pay impolitic. In respect to this general rule of policy, therefore, no solid discrimination can be made between the political situation of this country and that in which the rule was first adopted. This was the view taken by the court of appeals of the state of New York in the case of *Bliss v. Lawrence*, 58 N. Y. 442, 17 Am. Rep. 273, after a thorough review of the English and American cases by Judge Johnson. This has become a leading case in this country, and the doctrine announced by it, namely, that the assignment by a public officer of the future salary of his office is contrary to public policy, and void, has been followed in this country in the cases of *Bangs v. Dunn*, 66 Cal. 72, 4 Pac. 963; *Schloss v. Hewlett*, 81 Ala. 266, 1 South. 263; *Beal v. McVicker*, 8 Mo. App. 202. Involving the same principle is the case of *Field v. Chipley*, 79 Ky. 260, 42 Am. Rep. 215.

The foregoing doctrine in respect to the non-assignability of unearned official pay may be regarded as settled in this country, as it is in England, by the great weight of reason and authority. Nor is there any difference between the position of a retired army officer in this country, and those officers in respect to whose pay the English court were ruling. The officer here, as well as there, although retired from actual campaigning, is still subject to military orders. By the federal statute he is liable to be assigned to officer soldiers' homes, and to instruct in military institutes. Rev. St. U. S. §§ 1256, 1259, 4816. He stands, therefore, upon the footing of an officer owing service to the

public when called upon for its rendition, and the rule announced protects his pay from himself and his creditors until he earns it. The decree below must be reversed.

Reversed unanimously.

6. RAY v. GARRISON.

(Court of Appeals of District of Columbia, 1914. 42 App. D. C. 34.)

Hearing on an appeal by the plaintiff from a decree of the Supreme Court of the District of Columbia dismissing his bill for an injunction to restrain the defendants from taking any action in violation of his right to be nominated by the President as deputy paymaster general and from recommending that the President nominate any other than the plaintiff to such office. Affirmed.

The Court in the opinion stated the facts as follows:

This is an appeal from a decree in the supreme court of the District dismissing, upon demurrer, appellant Beecher B. Ray's bill for an injunction to restrain Lindley M. Garrison, Secretary of War, and Henry Breckinridge, Assistant Secretary of War, appellees, "and their respective agents and subordinates, from taking any action or steps of whatsoever kind in violation of plaintiff's (appellant's) right to be nominated by the President of the United States to the Senate thereof as deputy paymaster general with the rank of lieutenant colonel, and from taking any action or steps to certify in any manner whatsoever, make known, or indicate to the President of the United States or any other officer thereof, that anyone other than plaintiff is entitled to such office and the nomination thereto," and for such other and further relief as the facts may warrant.

Appellant sets forth in his bill that he is in all respects duly qualified and acting as senior major in the quartermaster's corps of the Army, and, as such, is lawfully entitled to promotion as deputy quartermaster general of the United States with the rank of lieutenant colonel, agreeably to the provisions of the act of October 1, 1890, 26 Stat. at L. 562, chap. 1241, U. S. Comp. Stat. 1901, p. 849, which require that promotions to every grade in the Army below the rank of brigadier general "shall, subject to the examination hereinafter provided for, be made according to seniority in the next lower grade." He further avers that appellees intend "to and will certify and make known to the President of the United States that someone other than plaintiff should be nominated by said President to the Senate of the United States as entitled to the vacancy existing in the quartermaster's corps in the rank of lieutenant colonel, to which office plaintiff is by law justly entitled and has the sole and exclusive right thereto."

Mr. Justice ROBB delivered the opinion of the Court:

It is the contention of appellant that "while no specific statutory duty is pointed out, yet the threatened action is within the reach of the court because any attempted violation of the act of 1890 is necessarily illegal and unconstitutional." The initial question, therefore, is whether appellees have been shown to have such connection with the execution of this statute as that their acts may be drawn in question here.

In *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535, the court ruled that the suit brought by the receiver of a railroad against the attorney general of the State of Alabama and the solicitor of the 11th judicial circuit of that State, to restrain them from taking steps to enforce, against the complainants, the provisions of a law of that State reducing tolls which had been exacted of the public under a prior law for crossing on a bridge of the railroad over a river, was a suit against the State and therefore could not be maintained. The court, after pointing out that neither official against whom the suit was brought was charged by law with any special duty in connection with the enforcement of the act in question, observed: "In the present case, as we have said, neither of the State officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former as the executive of the State was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the State in litigation involving the enforcement of its statutes." In *Ex parte Young*, 209 U. S. 123, 157, 28 Sup. Ct. 441, 52 L. Ed. 714, 728, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, the court ruled that in making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, "such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party."

No duty is imposed upon the appellees in respect to the execution of the act in question. Section 3 authorizes the President to prescribe a system of examination of all officers of the Army below the rank of major to determine their fitness for promotion, and provides that when any officer fails to pass a satisfactory examination and is reported unfit for promotion the officer next below him in rank who does pass shall receive the promotion. But it is not even averred that appellees are charged or have been interested with any duty in respect of such examination. In substance, appellant's grievance is that having successfully passed the examination upon which his right to promotion in part depends, appellees volunteered to advise the President to promote someone else. If the statute required appellees to certify to the President the name of the officer entitled to promotion, some duty would then be laid upon them, and the court would be justified in interpreting the act; for where an official is directed to do a certain act the court must assume that the executive desires its legal performance. *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60. Where, however no such duty is imposed, there is no real justification for judicial interference. An attempt to invoke judicial interference in such a case is in effect an attempt to reach the executive through his representative, which may not be done.

While we fully appreciate the importance of this case to appellant, we are constrained to rule that no basis has been laid for judicial action. The decree must be affirmed, with costs.

Affirmed.

7. UNITED STATES v. ANDREWS.

(Supreme Court of the United States, 1916. 240 U. S. 90, 36 Sup. Ct. 349, 60 L. Ed. 541.)

Appeal from the Court of Claims to review an award of half pay to an Army officer while absent on leave.

See same case below, 49 Ct. Cl. 391.

The facts are stated in the opinion.

Mr. Chief Justice WHITE delivered the opinion of the court:

The United States appeals from a judgment awarding the appellee \$325, found to be due him under Revised Statutes, § 1265, Comp. Stat. 1913, § 2104, for half pay as a captain of cavalry of fifteen years' service for a period of three months from August 1 to October 31, 1907, during which time it was found he was absent on leave. The court stated the facts as follows:

"The claimant, having accepted employment with a commercial company was granted six months' leave of absence, to take effect January 1, 1907, by ¶ 2, Special Orders, No. 305, War Department, dated December 28, 1906, which leave was extended for four months, to take effect July 1, 1907, and to expire October 31, 1907, by ¶ 26, Special Orders, War Department, dated June 17, 1907.

"While the claimant was enjoying the extension of his leave of absence the Adjutant General of the United States Army, on July 31, 1907, sent him the following telegram:

"By direction of the President, although your leave is not revoked, your absence from this date will be without pay."

"His leave without pay from August 1, 1907, to October 31, 1907, was not requested by the claimant, but he did not file a protest against such action nor relinquish his leave and return to duty.

"The claimant was absent from duty from January 1, 1907, to October 31, 1907. From August 1, 1907, to October 31, 1907, he received no pay. His half pay for said period was \$325." [49 Ct. Cl. 391.]

It is apparent from the authorities cited in the per curiam opinion of the court below (*Glavey v. United States*, 182 U. S. 595, 21 Sup. Ct. 891, 45 L. Ed. 1247; *Whiting v. United States*, 35 Ct. Cl. 291, 301; *Dyer v. United States*, 20 Ct. Cl. 166) that the allowed recovery was based upon the conclusion that the half pay during the leave of absence was expressly sanctioned by law (Rev. Stat. § 1265), and hence any condition conflicting with such statutory right was void, and that the officer being entitled to rely upon the statute, no estoppel against him could be implied because of his having acted upon the leave, albeit it contained a condition in conflict with the rights conferred by the statute. To test the merits of these conclusions will dispose of the entire case, since all the contentions of the government are embraced

in three propositions: 1, the asserted existence of authority to grant the leave, conditioned on its being without pay, notwithstanding the statute; 2, even if such power did not exist, the binding effect of the condition upon the officer who accepted the leave which was subject to it; and 3, in any event, the impossibility of separating the grant of leave from the condition upon which the leave was based, thus, under the hypothesis of illegality, rendering the grant void, and causing the absence from duty which was enjoyed under the apparent sanction of the grant to be an absence without leave, for which, under the statute, no right to pay existed. It is manifest that these contentions assume, as did the conclusions of the court below, that the telegram stated in the findings operated to grant a new leave for the three months therein specified, subject to the condition that it should be without pay, and in separately testing the propositions we shall treat the telegraphic order as having that significance.

1. As in view of the plain text of Revised Statutes, § 1265, there is no room for disputing that the right to half pay during the period of the leave in question was conferred by the statute, there is and can be no dispute that, tested by the statute alone, the court below did not err in allowing the claim for such half pay. But the contention is that error was committed because the conferring of the right to pay by the statute was not exclusive, and therefore did not deprive of the authority as an incident to the power to grant the leave to affix the condition that the leave should be without pay notwithstanding the statute. It is unnecessary however, to stop to point out the unsoundness of this proposition, since the error upon which it rests is authoritatively demonstrated by previous decisions which substantially leave the proposition not open for discussion. *United States v. Williamson*, 23 Wall. 411, 416, 23 L. Ed. 89, 90; *United States v. Wilson*, 144 U. S. 24, 12 Sup. Ct. 539, 36 L. Ed. 332; *United States v. Shields*, 153 U. S. 88, 91, 14 Sup. Ct. 735, 38 L. Ed. 645, 646; *Glavey v. United States*, 182 U. S. 595, 21 Sup. Ct. 891, 45 L. Ed. 1247. Nor, in contemplation of the cases which we have just cited, and additionally, in view of the provision of Revised Statutes, § 1229, Comp. Stat. 1913, § 2001, that "no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof," is there any necessity to point out the want of application of the authorities dealing with the power to dismiss civil officers which are cited as a basis for the proposition that a like power applies to Army officers, and therefore, as there was authority to dismiss, the lesser right of granting the leave without pay necessarily obtained. So, also, it is unnecessary to enter into any detailed analysis of the decision in *Hartigan v. United States*, 196 U. S. 169, 25 Sup. Ct. 204, 49 L. Ed. 434, since that case concerned the power to remove a cadet at the Military Academy, and the recognition of the right to exercise that authority was in express terms based upon the view that although in a sense a part of the Army, cadets at the Military Academy were not officers within the intendment of Revised Statutes, § 1229, and indeed the opinion in the *Hartigan Case* in substance refutes the extreme contention as to power which is now sought to be sustained.

2. The contention as to the estoppel resulting from the failure to protest against the condition affixed to the leave, and the binding force of such condition, even if illegal, resulting from an acceptance of the leave containing it, is by necessary implication foreclosed by all the cases previously cited, and in fact was in express terms considered and held to be without merit in *Glavey v. United States*, 182 U. S. 595, 21 Sup. Ct. 891, 45 L. Ed. 1247. Because that case concerned an illegal condition attached to the performance of the duties of an office, and this involves an illegal condition attached to a grant of leave, affords no ground for distinction between that case and this. The basis of the ruling in the *Glavey Case* was the right of the official to rely upon the provisions of the statute, and the resulting want of power to apply a principle of estoppel. And as here there was express statutory authority for the half pay during the leave, the reason in the *Glavey Case* is controlling, and the distinction relied upon involves no difference justifying taking this case out of the principle settled in the *Glavey case*. As the statute conferred the right to the half pay during the leave, it necessarily follows that the exclusion of executive authority over that subject which resulted extended to and was co-terminous with the power which the statute exerted.

3. The contention that even if the condition which was attached to the leave be treated as illegal, and the acceptance of the leave containing it be decided not to have operated an estoppel, nevertheless, under such circumstances, the leave must be treated as void, and the absence based on it be held to have been one without leave, for which no pay could be allowed under the statute, is self-contradictory, and besides, in its essence, must rest upon the assumption that there was power to affix the condition, the terms of the statute to the contrary notwithstanding. The contention, therefore, is in substance foreclosed by *Glavey v. United States*, *supra*, and the decided cases to which we have previously referred. How completely this is the case will be demonstrated by observing that the decision in the *Glavey Case* was expressly based on the ground that public policy forbade giving any effect whatever to an attempt to deprive by unauthorized agreement made with an official, express or implied, under the guise of a condition or otherwise, of the right to the pay given by the statute. And, of course, the contention now made that the absence with leave, which carried pay under the statute, was converted into an absence without leave, carrying no pay, in consequence of an unauthorized attempt to subject the granted leave to an illegal provision that it should be without pay, is absolutely in conflict with the previous cases and the rule of public policy upon which they were based. In fact, the contention but in a changed form asserts the application of estoppel, which, as we have seen, was expressly adversely disposed of in the previous cases.

Affirmed.

Mr. Justice McREYNOLDS took no part in the consideration and decision of this case.

(c) Enlistment

1. In re GRIMLEY.

(Supreme Court of the United States, 1890. 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636.)

Appeal from the circuit court of the United States for the district of Massachusetts.

BREWER, J. John Grimley, the appellee, was, on the 28th day of May, 1888, found guilty by a court-martial of the crime of desertion, and sentenced to be imprisoned six months. While serving out this sentence at Fort Warren, Massachusetts, he sued out a writ of habeas corpus from the district court of the United States for the district of Massachusetts. That court, on June 25, 1888, discharged him from custody. The United States appeal to the circuit court for said district, which, on the 27th day of February, 1889, affirmed the decree of the district court. 38 Fed. Rep. 84. From this decision the United States has brought this appeal. The circuit court found that the petitioner was 40 years of age at the time of his alleged enlistment, although he represented himself to be but 28; and, under section 1116 of the Revised Statutes, ruled that the enlistment was void, and that Grimley never became a soldier, and was not subject to the jurisdiction of the court-martial. That section reads: "Recruits enlisting in the army must be effective and able-bodied men, and between the ages of sixteen and thirty-five years, at the time of their enlistment."

It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and, if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence. And, on the other hand, it is equally clear that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial, and that no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction. That being established, the habeas corpus must be denied, and the petitioner remanded. That wanting, it must be sustained, and the petitioner discharged. If Grimley was an enlisted soldier, he was amenable to the jurisdiction of the court-martial; and the principal question, the one ruled against the government, is whether Grimley's enlistment was void by reason of the fact that he was over 35 years of age.

This case involves a matter of contractual relation between the parties; and the law of contracts, as applicable thereto, is worthy of notice. The government, as contracting party, offers contract and service. Grimley accepts such contract, declaring that he possesses all the qualifications prescribed in the government's offer. The contract is duly signed. Grimley has made an untrue statement in regard to his qualifications. The government makes no objection because of the untruth. The qualification is one for the benefit of the government, one of the contracting parties. Who can take advantage of Grimley's lack of qualification? Obviously only the party for whose benefit it was inserted. Such is the ordinary law of contracts. Suppose A., an individual, were to offer to enter into contract with persons of Anglo-Saxon

descent, and B., representing that he is of such descent, accepts the offer and enters into contract; can he thereafter, A. making no objection, repudiate the contract on the ground that he is not of Anglo-Saxon descent? A. has prescribed the terms. He contracts with B. upon the strength of his representations that he comes within those terms. Can B. thereafter plead his disability in avoidance of the contract? On the other hand, suppose for any reason it could be contended that the proviso as to age was for the benefit of the party enlisting, is Grimley in any better position? The matter of age is merely incidental, and not of the substance of the contract. And can a party by false representations as to such incidental matter obtain a contract, and thereafter disown and repudiate its obligations on the simple ground that the fact in reference to this incidental matter was contrary to his representations? May he utter a falsehood to acquire a contract, and plead the truth to avoid it, when the matter in respect to which the falsehood is stated is for his benefit? It must be noted here that in the present contract is involved no matter of duress, imposition, ignorance, or intoxication. Grimley was sober, and of his own volition went to the recruiting office and enlisted. There was no compulsion, no solicitation, no misrepresentation. A man of mature years, he entered freely into the contract. But in this transaction something more is involved than the making of a contract, whose breach exposes to an action for damages. Enlistment is a contract, but it is one of those contracts which changes the status, and where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. Marriage is a contract; but it is one which creates a status. Its contract obligations are mutual faithfulness; but a breach of those obligations does not destroy the status or change the relation of the parties to each other. The parties remain husband and wife no matter what their conduct to each other,—no matter how great their disregard of marital obligations. It is true that courts have power, under the statutes of most states, to terminate those contract obligations, and put an end to the marital relations. But this is never done at the instance of the wrong-doer. The injured party, and the injured party alone, can obtain relief and a change of status by judicial action. So, also, a foreigner by naturalization enters into new obligations. More than that, he thereby changes his status; he ceases to be an alien, and becomes a citizen, and, when that change is once accomplished, no disloyalty on his part, no breach of the obligations of citizenship, of itself, destroys his citizenship. In other words, it is a general rule accompanying a change of status, that, when once accomplished it is not destroyed by the mere misconduct of one of the parties, and the guilty party cannot plead his own wrong as working a termination and destruction thereof. Especially is he debarred from pleading the existence of facts personal to himself, existing before the change of status, the entrance into new relations, which would have excused him from entering into those relations and making the change, or, if disclosed to the other party, would have led it to decline admission into the relation, or consent to the change.

By enlistment the citizen becomes a soldier. His relations to the state and the public are changed. He acquires a new status, with cor-

relative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the state not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the state, would not have entered into the new relations with him, or permitted him to change his status. Of course these considerations may not apply where there is insanity, idiocy, infancy, or any other disability which, in its nature, disables a party from changing his status or entering into new relations. But where a party is *sui juris*, without any disability to enter into the new relations, the rule generally applies as stated. A naturalized citizen would not be permitted, as a defense to a charge of treason, to say that he had acquired his citizenship through perjury, that he had not been a resident of the United States for five years, or within the state or territory where he was naturalized one year, or that he was not a man of good moral character, or that he was not attached to the constitution. No more can an enlisted soldier avoid a charge of desertion, and escape the consequences of such act, by proof that he was over age at the time of enlistment, or that he was not able-bodied, or that he had been convicted of a felony, or that before his enlistment he had been a deserter from the military service of the United States. These are matters which do not inhere in the substance of the contract, do not prevent a change of status, do not render the new relations assumed absolutely void; and in the case of a soldier, these considerations become of vast public importance. While our regular army is small compared with those of European nations, yet its vigor and efficiency are equally important.

An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer, and confidence among the soldiers in one another, are impaired if any question be left open as to their attitude to each other. So, unless there be in the nature of things some inherent vice in the existence of the relation, or natural wrong in the manner in which it was established, public policy requires that it should not be disturbed. Now, there is no inherent vice in the military service of a man 40 years of age. The age of 35, as prescribed in the statute, is one of convenience merely. The government has the right to the military service of all its able-bodied citizens; and may, when emergency arises, justly exact that service from all. And if, for its own convenience, and with a view to the selection of the best material, it has fixed the age at 35, it is a matter which in any given case it may waive; and it does not lie in the mouth of any one above that age on that account alone, to demand release from an obligation voluntarily assumed, and discharge from a service voluntarily entered into. The government, and the government alone, is the party to the transaction that can raise objections on that ground. We conclude, therefore, that the age of the petitioner was no ground for his discharge.

A minor question arises on these facts as to whether the petitioner was in fact enlisted. It appears that on Saturday, February 18, 1888,

the petitioner entered the recruiting rendezvous in Boston, and expressed a desire to enlist. He underwent a physical examination. He took the oath of allegiance before the recruiting officer, signed the clothing rolls, and was placed in charge of the sergeant. The latter took him to the clothing-room, and selected for his uniform a cap, trousers, blanket, shirt, and pair of stockings, and laid them before him. He put none of these articles on except the cap, and that in a few minutes he took off. He then asked permission to go away and see his friends, and the sergeant told him to go, and be back on Monday. He went away in his citizen's clothes, returned to his mother's house and told her what he had done. She was very much grieved, and after some conversation with him went to the recruiting office, and finding three men there, told them her errand, and was advised substantially that Grimley need not come back, and might go to work. Who these men were is not disclosed. On the strength of that he did not return, but went off and engaged in service as a coachman. He was arrested as a deserter on May 16, 1888, brought before a court-martial, and found guilty, as heretofore stated.

The oath of allegiance which he took was as follows: "The United States of America. State of Massachusetts, city or town of Boston—ss.: I, John Grimley, born in Armagh, in the state of Ireland, aged twenty-eight years and ——— months, and by occupation a groom, do hereby acknowledge to have voluntarily enlisted, this eighteenth day of February, 1888, as a soldier in the army of the United States of America, for the period of five years, unless sooner discharged by proper authority; and do also agree to accept from the United States such bounty, pay, rations, and clothing as are or may be established by law. And I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the president of the United States, and the orders of the officers appointed over me, according to the rules and articles of war. John Grimley. [Seal.] Subscribed and duly sworn to before me this 18th day of February, A. D. 1888. James Miller, Captain 2d Infantry, Recruiting Officer."

The question presented is whether the petitioner had, in fact, enlisted and become a soldier. It will be noticed that in this oath of allegiance is an acknowledgment that he had enlisted, and that it was not an agreement to enlist. In this respect this case differs from that of *Tyler v. Pomeroy*, 8 Allen (Mass.) 480, in which the plaintiff, with others, had signed a paper by which, in terms, they agreed to serve for a period of three years "from the date of our being mustered into the United States' service." In that case Mr. Justice Gray, then a member of the supreme court of Massachusetts, in an opinion reviewing all the authorities in England and in this country, drew a distinction between an agreement to enlist, which, if broken, simply gives a right of action for damages, and an enlistment, which changes the status of the party, transfers him from civil to military life, and renders him amenable to military jurisdiction. Section 1342 of the Revised Statutes provides that the army of the United States shall be governed by certain rules and articles thereafter stated. Article 2 provides: "These

rules and articles shall be read to every enlisted man at the time of, or within six days after, his enlistment, and he shall thereupon take an oath or affirmation," etc. Obviously, the oath is the final act in the matter of enlistment. Article 47, respecting desertion, reads: "Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same," etc. By this, either receipt of pay or enlistment determines the status; and after enlistment the party becomes amenable to military jurisdiction, although no actual service may have been rendered and no pay received.

It is insisted that the articles of war were not read to him; but that is not a prerequisite. "Within six days after" is the statute. The reading of the 128 articles, many of which do not concern the duty of a soldier, is not essential to his enlistment. Paragraph No. 766 of the army regulations of 1881 is as follows: "The forms of declaration, and of consent in the case of a minor, having been signed and witnessed, the recruit will then be duly examined by the recruiting officer and surgeon, if one be present, and, if accepted, the 47th and 103d articles of war will be read to him, after which he will be allowed time to consider the subject until his mind appears to be fully made up before the oath is administered to him." That this was complied with is probable, from the testimony. The petitioner testifies that something was read to him out of a book, though he is unable to say what it was; and Captain Miller, the recruiting officer, testifies that he is under the impression, though not positive, that he read the forty-seventh article to him. He also says that he had quite a conversation with him, inquiring as to his past life and why he had decided to enlist. No solicitations were used, no advantage taken of him. The enlistment was a deliberate act. No specified amount of time for the purpose of consideration is prescribed by the regulation. The oath is not to be administered until his mind is fully made up, and that is all that is required. There is nothing in the circumstances surrounding the enlistment to vitiate the transaction. We conclude, therefore, upon the whole case, that the age of the petitioner was no bar to his enlistment of which he can take advantage; that the taking of the oath of allegiance is the pivotal fact which changes the status from that of civilian to that of soldier; that the enlistment was a deliberate act on the part of the petitioner; and that the circumstances surrounding it were not such as would enable him, of his own volition, to ignore it, or justify a court in setting it aside.

The judgment of the circuit court will be reversed, and the case remanded, with instructions to reverse the decree of the district court and take such further proceedings as shall be in conformity with the opinion of this court.

2. In re MORRISSEY.

(Supreme Court of the United States, 1890. 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644.)

Appeal from the circuit court of the United States for the eastern district of Missouri.

BREWER, J. This case, appealed from the circuit court for the eastern district of Missouri, presents, like that of *U. S. v. Grimley*, ante, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636, (just decided,) a question arising on habeas corpus as to the right of the petitioner, an enlisted soldier, to be discharged from military custody. An effort was made to bring this case here by writ of error; but that was abandoned, and an appeal rightfully substituted. In *re Neagle*, 135 U. S. 42, 10 Sup. Ct. 658, 34 L. Ed. 55. The facts differ from those in that case, in this: The petitioner was 17 years of age, and had a mother living who did not consent to his enlistment. Upon his enlistment he drew from the United States his uniform and equipments, and continued in actual service from the 23d day of August to the 13th day of September, 1883, when he deserted. He remained in concealment until February, 1889, at which time he had become of age, and then appeared at a recruiting office and demanded his discharge from the army on the ground that he was a minor when enlisted. In his oath of allegiance he swore that he was 21 years and 5 months old. It will be seen that the petitioner was within the ages prescribed by section 1116 of the Revised Statutes, to-wit, 16 and 35 years. Section 1117 provides that "no person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: provided, that such minor has such parents or guardians entitled to his custody and control." But this provision is for the benefit of the parent or guardian. It means simply that the government will not disturb the control of parent or guardian over his or her child without consent. It gives the right to such parent or guardian to invoke the aid of the court, and secure the restoration of a minor to his or her control; but it gives no privilege to the minor. The age at which an infant shall be competent to do any acts or perform any duties, military or civil, depends wholly upon the legislature. *U. S. v. Bainbridge*, 1 Mason, 71, Fed. Cas. No. 14,497; *Wassum v. Feeney*, 121 Mass. 93, 95, 23 Am. Rep. 258. Congress has declared that minors over the age of 16 are capable of entering the military service, and undertaking and performing its duties. An enlistment is not a contract only, but effects a change of status. *Grimley's Case*, supra. It is not, therefore, like an ordinary contract, voidable by the infant. At common law an enlistment was not voidable either by the infant or by his parents or guardians. *King v. Inhabitants*, etc., 2 Dowl. & R. 628, 634, 1 Barn. & C. 345, 350; *King v. Inhabitants*, etc., 1 Man. & R. 25, 31, 7 Barn. & C. 226, 231; *Com. v. Gamble*, 11 Serg. & R. (Pa.) 93; *U. S. v. Blakeney*, 3 Grat. (Va.) 405, 411-413. In this case the parent never insisted upon her right of custody and control; and the fact that he had a mother living at the time is,

therefore, immaterial. The contract of enlistment was good so far as the petitioner is concerned. He was not only de facto, but de jure, a soldier—amenable to military jurisdiction. His mother not interfering, he was bound to remain in the service. His desertion and concealment for five years did not relieve him from his obligations as a soldier, or his liability to military control.

The order of the circuit court remanding him to the custody of the appellee was correct, and must be affirmed.

PART II. WAR-TIME SOURCES

A. LEGISLATIVE ENACTMENTS

1. NATIONAL DEFENSE ACT

[Public No. 85—64th Congress. H. R. 12766.]

An Act for making further and more effectual provision for the national defense, and for other purposes. [June 3, 1916.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Army of the United States shall consist of the Regular Army, the Volunteer Army, the Officers' Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States, and such other land forces as are now or may hereafter be authorized by law.

Sec. 2. *Composition of the Regular Army.*—The Regular Army of the United States, including the existing organizations, shall consist of sixty-four regiments of Infantry, twenty-five regiments of Cavalry, twenty-one regiments of Field Artillery, a Coast Artillery Corps, the brigade, division, army corps, and army headquarters, with their detachments and troops, a General Staff Corps, an Adjutant General's Department, an Inspector General's Department, a Judge Advocate General's Department, a Quartermaster Corps, a Medical Department, a Corps of Engineers, an Ordnance Department, a Signal Corps, the officers of the Bureau of Insular Affairs, the Militia Bureau, the detached officers, the detached noncommissioned officers, the chaplains, the Regular Army Reserve, all organized as hereinafter provided, and the following as now authorized by law: The officers and enlisted men on the retired list; the additional officers; the professors, the Corps of Cadets, the general Army service detachment, and detachments of Cavalry, Field Artillery, and Engineers, and the band of the United States Military Academy; the post non-commissioned staff officers; the recruiting parties, the recruit depot detachments, and unassigned recruits; the service school detachments; the disciplinary guards; the disciplinary organizations; the Indian Scouts; and such other officers and enlisted men as are now or may be hereafter provided for: Provided, That hereafter the enlisted personnel of all organizations of the Regular Army shall at all times be maintained at a strength not below the minimum strength fixed by law: Provided further, That the total enlisted force of the line of the Regular Army, excluding the Philippine Scouts and the enlisted men of the Quartermaster Corps, of the Medical Department, and of the Signal Corps, and the unassigned recruits, shall not at any one time, except in the event of actual or threatened war or similar emergency in which the public safety demands it, exceed one hundred and seventy-five thousand men: Provided further, That the

unassigned recruits at depots or elsewhere shall at no time, except in time of war, exceed by more than seven per centum the total authorized enlisted strength.

Sec. 3. *Composition of brigades, divisions, and so forth.*—The mobile troops of the Regular Army of the United States shall be organized, as far as practicable, into brigades and divisions. The President is authorized, in time of actual or threatened hostilities, or when in his opinion the interest of the public service demand it, to organize the brigades and divisions into such army corps or armies as may be necessary. The typical Infantry brigade shall consist of a headquarters and three regiments of Infantry. The typical Cavalry brigade shall consist of a headquarters and three regiments of Cavalry. The typical Field Artillery brigade shall consist of a headquarters and three regiments of Field Artillery. The typical Infantry division shall consist of a headquarters, three Infantry brigades, one regiment of Cavalry, one Field Artillery brigade, one regiment of Engineers, one field signal battalion, one aero squadron, one ammunition train, one supply train, one engineer train, and one sanitary train. The typical Cavalry division shall consist of a headquarters, three Cavalry brigades, one regiment of Field Artillery (horse), one battalion of mounted Engineers, one field signal battalion (mounted), one aero squadron, one ammunition train, one supply train, one engineer train, and one sanitary train. The typical army corps shall consist of a headquarters, two or more Infantry divisions, one or more Cavalry brigades or a Cavalry division, one Field Artillery brigade, one telegraph battalion, and one field signal battalion, and such ammunition, supply, engineer, and sanitary trains as the President may deem necessary. A brigade, a division, an army corps, and an army headquarters shall consist of such officers, enlisted men, and civilians as the President may prescribe. Each supply train, ammunition train, sanitary train, and engineer train shall consist of such officers and enlisted men and shall be organized as the President may prescribe, the line officers necessary therewith to be detailed under the provisions of sections twenty-six and twenty-seven, Act of Congress approved February second, nineteen hundred and one. Nothing herein contained, however, shall prevent the President from increasing or decreasing the number of organizations prescribed for the typical brigades, divisions, and army corps, or from prescribing new and different organizations and personnel as the efficiency of the service may require.

Sec. 4. *General officers of the line.*—Officers commissioned to and holding in the Army the office of a general officer shall hereafter be known as general officers of the line; officers commissioned to and holding in the Army an office other than that of a general officer, but to which the rank of a general officer is attached, shall be known as general officers of the staff. The number of general officers of the line now authorized by law is hereby increased by four major generals and nineteen brigadier generals: Provided, That hereafter in time of peace major generals of the line shall be appointed from officers of the grade of brigadier general of the line, and brigadier

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unassigned recruits at depots or elsewhere shall at no time, except in time of war, exceed by more than seven per centum the total authorized enlisted strength.

Sec. 3. *Composition of brigades, divisions, and so forth.*—The mobile troops of the Regular Army of the United States shall be organized, as far as practicable, into brigades and divisions. The President is authorized, in time of actual or threatened hostilities, or when in his opinion the interest of the public service demand it, to organize the brigades and divisions into such army corps or armies as may be necessary. The typical Infantry brigade shall consist of a headquarters and three regiments of Infantry. The typical Cavalry brigade shall consist of a headquarters and three regiments of Cavalry. The typical Field Artillery brigade shall consist of a headquarters and three regiments of Field Artillery. The typical Infantry division shall consist of a headquarters, three Infantry brigades, one regiment of Cavalry, one Field Artillery brigade, one regiment of Engineers, one field signal battalion, one aero squadron, one ammunition train, one supply train, one engineer train, and one sanitary train. The typical Cavalry division shall consist of a headquarters, three Cavalry brigades, one regiment of Field Artillery (horse), one battalion of mounted Engineers, one field signal battalion (mounted), one aero squadron, one ammunition train, one supply train, one engineer train, and one sanitary train. The typical army corps shall consist of a headquarters, two or more Infantry divisions, one or more Cavalry brigades or a Cavalry division, one Field Artillery brigade, one telegraph battalion, and one field signal battalion, and such ammunition, supply, engineer, and sanitary trains as the President may deem necessary. A brigade, a division, an army corps, and an army headquarters shall consist of such officers, enlisted men, and civilians as the President may prescribe. Each supply train, ammunition train, sanitary train, and engineer train shall consist of such officers and enlisted men and shall be organized as the President may prescribe, the line officers necessary therewith to be detailed under the provisions of sections twenty-six and twenty-seven, Act of Congress approved February second, nineteen hundred and one. Nothing herein contained, however, shall prevent the President from increasing or decreasing the number of organizations prescribed for the typical brigades, divisions, and army corps, or from prescribing new and different organizations and personnel as the efficiency of the service may require.

Sec. 4. *General officers of the line.*—Officers commissioned to and holding in the Army the office of a general officer shall hereafter be known as general officers of the line; officers commissioned to and holding in the Army an office other than that of a general officer, but to which the rank of a general officer is attached, shall be known as general officers of the staff. The number of general officers of the line now authorized by law is hereby increased by four major generals and nineteen brigadier generals: Provided, That hereafter in time of peace major generals of the line shall be appointed from officers of the grade of brigadier general of the line, and brigadier

generals of the line shall be appointed from officers of the grade of colonel of the line of the Regular Army.

Sec. 5. *The General Staff Corps.*—The General Staff Corps shall consist of one Chief of Staff, detailed in time of peace from major generals of the line; two Assistants to the Chief of Staff, who shall be general officers of the line, one of whom, not above the grade of brigadier general, shall be the president of the Army War College; ten colonels; ten lieutenant colonels; fifteen majors; and seventeen captains, to be detailed from corresponding grades in the Army, as in this section hereinafter provided. All officers detailed in the General Staff Corps shall be detailed therein for periods of four years, unless sooner relieved. While serving in the General Staff Corps officers may be temporarily assigned to duty with any branch of the Army. Upon being relieved from duty in the General Staff Corps officers shall return to the branch of the Army in which they hold permanent commissions, and no officer shall be eligible to a further detail in the General Staff Corps until he shall have served two years with the branch of the Army in which commissioned, except in time of actual or threatened hostilities. Section twenty-seven of the Act of Congress approved February second, nineteen hundred and one, shall apply to each position vacated by officers below the grade of general officer detailed in the General Staff Corps.

Not more than one-half of all of the officers detailed in said corps shall at any time be stationed, or assigned to or employed upon any duty, in or near the District of Columbia. All officers detailed in said corps shall be exclusively employed in the study of military problems, the preparation of plans for the national defense and the utilization of the military forces in time of war, in investigating and reporting upon the efficiency and state of preparedness of such forces for service in peace or war, or on appropriate general staff duties in connection with troops, including the National Guard, or as military attachés in foreign countries, or on other duties, not of an administrative nature, on which they can be lawfully and properly employed: Provided, That no officer shall be detailed as a member of the General Staff Corps, other than the Chief of Staff and the general officers herein provided for as assistants to the Chief of Staff, except upon the recommendation of a board of five officers not below the rank of colonel, who shall be selected by the President or the Secretary of War, and neither the Chief of Staff nor more than two other members of the General Staff Corps, nor any officer not a member of said corps, who shall have been stationed or employed on any duty in or near the District of Columbia within one year prior to the date of convening of any such board, shall be detailed as a member thereof. No recommendation made by any such board shall, for more than one year after the making of such recommendation or at any time after the convening of another such board, unless again recommended by the new board, be valid as a basis for the detail of any officer as a member of the General Staff Corps; and no alteration whatever shall be made in any report or recommendation of any such board, either with or without the consent of members thereof, after the board shall have submitted such report or recommendation and

shall have adjourned sine die: Provided further, That the War College shall remain fully subject to the supervising, coordinating, and informing powers conferred by law upon members of the General Staff Corps, and officers for duty as instructors or students in or as attachés of said college may be selected and detailed freely from among members of said corps, but any officer so selected and detailed other than one director shall thereupon cease to be a member of said corps and shall not be eligible for redetail therein so long as he shall remain on said duty; and no officer on the active list of the Army shall, for more than thirty days in any calendar year, be attached to or assigned to duty in the War College in any capacity other than that of president, director, instructor, or student, or, unless a member of the General Staff Corps, be attached to or employed in the office of the Chief of Staff: Provided further, That the organizations heretofore existing in or in connection with the office of the Chief of Staff under the designations of the mobile army division and the Coast Artillery division be, and they are hereby abolished and shall not be reestablished. The business heretofore transacted in said divisions, except such as comes clearly within the general powers specified in and conferred upon members of the General Staff Corps by the organic Act of Congress approved February fourteenth, nineteen hundred and three, is hereby transferred as follows, to wit, to the office of the Chief of Coast Artillery, all business apportioned to that office by law or Army regulations at the time of the creation of the Coast Artillery division of the office of the Chief of Staff; to the office of The Adjutant General or other bureau or bureaus concerned, all other business; and, subject to the exercise of the supervising, coordinating, and informing powers conferred upon members of the General Staff Corps by the Act of Congress last hereinbefore cited, the business transferred by this proviso to certain bureaus or offices shall hereafter be transacted exclusively by or under the direction of the respective heads thereof; and the Chief of Coast Artillery shall be an additional member of the General Staff Corps and shall also be advisor to and informant of the Chief of Staff in respect to the business under his charge: Provided further, That hereafter members of the General Staff Corps shall be confined strictly to the discharge of the duties of the general nature of those specified for them in this section and in the organic Act of Congress last hereinbefore cited, and they shall not be permitted to assume or engage in work of an administrative nature that pertains to established bureaus or offices of the War Department, or that, being assumed or engaged in by members of the General Staff Corps, would involve impairment of the responsibility or initiative of such bureaus or offices, or would cause injurious or unnecessary duplication of or delay in the work thereof: Provided further, That all pay and allowances shall be forfeited by any superior for any period during which, by his order or his permission, or by reason of his neglect, any subordinate shall violate any of the foregoing provisions of this section: Provided further, That if any officer detailed in the General Staff Corps, or as an officer of any staff corps or department of the Army, shall be promoted to the next higher grade while so serv-

ing he may be permitted to serve out the period of his detail, and the number of officers in the organization in which he shall be serving and in the grade to which he shall have been promoted shall be increased by one for such time as he shall be an additional number in said organization and grade; but the whole number of officers detailed to said organization shall at no time exceed the aggregate of the numbers allowed to the several grades thereof by law other than this proviso.

Sec. 6. *The Adjutant General's Department.*—The Adjutant General's Department shall consist of The Adjutant General with the rank of brigadier general; seven adjutants-general with the rank of colonel; thirteen adjutants-general with the rank of lieutenant colonel; and thirty adjutants-general with the rank of major.

Sec. 7. *The Inspector General's Department.*—The Inspector General's Department shall consist of one Inspector General with the rank of brigadier general; four inspectors-general with the rank of colonel; eight inspectors-general with the rank of lieutenant colonel; and sixteen inspectors-general with the rank of major.

Sec. 8. *The Judge Advocate General's Department.*—The Judge Advocate General's Department shall consist of one Judge Advocate General with the rank of brigadier general; four judge advocates with the rank of colonel; seven judge advocates with the rank of lieutenant colonel; and twenty judge advocates with the rank of major: Provided, That acting judge advocates may be detailed under the provisions of existing law for separate brigades and for separate general court-martial jurisdictions, and when not immediately required for service with a geographical department, tactical division, separate brigade, or other separate general court-martial jurisdiction, acting judge advocates may be assigned to such other legal duty as the exigencies of the service may require: Provided further, That, of the vacancies created in the Judge Advocate General's Department by this Act, one such vacancy, not below the grade of major, shall be filled by the appointment of a person from civil life, not less than forty-five nor more than fifty years of age, who shall have been for ten years a judge of the Supreme Court of the Philippine Islands, shall have served for two years as a captain in the Regular or Volunteer Army, and shall be proficient in the Spanish language and laws: Provided further, That so much of the Act of Congress approved August twenty-fourth, nineteen hundred and twelve, as relates to the detachment or detail of officers for duty in the Judge Advocate General's Department shall hereafter be held to apply only to the acting judge advocates authorized by law; and hereafter no officer shall be or remain detached from any command or assigned to any duty or station with intent to enable or aid him to pursue the study of law: And provided further, That no officer of the Judge Advocate General's Department below the rank of colonel shall be promoted therein until he shall have successfully passed a written examination before a board consisting of not less than two officers of the Judge Advocate General's Department, to be designated by the Secretary of War, such examination to be prescribed by the Secretary of War and to be held at such time anterior to the accruing of

the right to promotion as may be for the best interests of the service: Provided, That should any officer in the grade of major of the Judge Advocate General's Department fail in his physical examination and be found incapacitated for service by reason of physical disability contracted in the line of duty, he shall be retired with the rank to which his seniority entitled him to be promoted; but if he should be found disqualified for promotion for any other reason, a second examination shall not be allowed, but the Secretary of War shall appoint a board of review to consist of two officers of the Judge Advocate General's Department superior in rank to the officer examined, none of whom shall have served as a member of the board which examined him. If the unfavorable finding of the examining board is concurred in by the board of review, the officer reported disqualified for promotion shall be honorably discharged from the service with one year's pay. If the action of the examining board is disapproved by the board of review, the officer shall be considered qualified and shall be promoted: Provided further, That any lieutenant colonel of the Judge Advocate General's Department who, at his first examination for promotion to the grade of colonel, has been found disqualified for such promotion for any reason other than physical disability incurred in the line of duty shall be suspended from promotion and his right thereto shall pass successively to such officers next below him in rank as are or may become eligible to promotion under existing law during the period of his suspension; and any such officer suspended from promotion shall be reexamined as soon as practicable after the expiration of one year from the date of the completion of the examination that resulted in his suspension; and if on such reexamination he is found qualified for promotion, he shall again become eligible thereto; but if he is found disqualified by reason of physical disability incurred in line of duty in either examination, he shall be retired, with the rank to which his seniority entitled him to be promoted; and if he is not found disqualified by reason of such physical disability, but is found disqualified for promotion for any other reason in the second examination, he shall be retired without promotion.

Sec. 9. *The Quartermaster Corps.*—The Quartermaster Corps shall consist of one Quartermaster General with the rank of major general; two assistants to the Quartermaster General with the rank of brigadier general; twenty-one colonels; twenty-four lieutenant colonels; sixty-eight majors; one hundred and eighty captains; and the pay clerks now in active service, who shall hereafter have the rank, pay, and allowances of a second lieutenant, and the President is hereby authorized to appoint and commission them, by and with the advice and consent of the Senate, second lieutenants in the Quartermaster Corps, United States Army. The total enlisted strength of the Quartermaster Corps and the number in each grade shall be limited and fixed from time to time by the President in accordance with the needs of the Army, and shall consist of quartermaster sergeants, senior grade; quartermaster sergeants; sergeants, first class; sergeants; corporals; cooks; privates, first class; and privates. The number in the various grades shall not exceed the following per-

centages of the total authorized enlisted strength of the Quartermaster Corps, namely: Quartermaster sergeants, senior grade, five-tenths of one per centum; quartermaster sergeants, six per centum; sergeants, first class, two and five-tenths per centum; sergeants, twenty-five per centum; corporals, ten per centum; privates, first class, forty-five per centum; privates, nine per centum; cooks, two per centum: Provided, That the master electricians now authorized by law for the Quartermaster Corps shall hereafter be known as quartermaster sergeants, senior grade, and shall be included in the number of quartermaster sergeants, senior grade, herein authorized: And provided further, That all work pertaining to construction and repair that has heretofore been done by or under the direction of officers of the Quartermaster Corps shall, except as otherwise now provided by laws or regulations, hereafter be done by or under the direction of officers of said corps.

Sec. 10. *The Medical Department.*—The Medical Department shall consist of one Surgeon General, with the rank of major general during the active service of the present incumbent of that office, and thereafter with the rank of brigadier general, who shall be chief of said department, a Medical Corps, a Medical Reserve Corps within the limit of time fixed by this Act, a Dental Corps, a Veterinary Corps, an enlisted force, the Nurse Corps and contract surgeons as now authorized by law, the commissioned officers of which shall be citizens of the United States.

The Medical Corps shall consist of commissioned officers below the grade of brigadier general, proportionally distributed among the several grades as in the Medical Corps now established by law. The total number of such officers shall approximately be equal to, but not exceed, except as hereinafter provided, seven for every one thousand of the total enlisted strength of the Regular Army authorized from time to time by law: Provided, That if by reason of a reduction by law in the authorized enlisted strength of the Army aforesaid the total number of officers in the Medical Corps commissioned previously to such reduction shall for the time being exceed the equivalent of seven to one thousand of such reduced enlisted strength no original appointment to commissioned rank in said corps shall be made until the total number of commissioned officers thereof shall have been reduced below the equivalent of seven to the thousand of the said reduced enlisted strength, nor thereafter so as to make the total number of commissioned officers thereof in excess of the equivalent of seven to the thousand of said reduced enlisted strength; and no promotion shall be made above the grade of captain in said corps until the number of officers in the grade above that of captain to which the promotion is due shall have been reduced below the proportional number authorized for such grade on the basis of the reduced enlisted strength, nor thereafter so as to make the number of officers in such grade in excess of the proportional number authorized on the basis of said reduced enlisted strength: Provided further, That when in time of war the Regular Army shall have been increased by virtue of the provisions of this or any other Act, the medical officers appointed to meet such increase shall be honorably discharged

from the service of the United States when the reduction of the enlisted strength of the Army shall take place: Provided further, That persons hereafter commissioned in the Medical Corps shall be citizens of the United States between the ages of twenty-two and thirty years and shall be promoted to the grade of captain upon the completion of five years' service in the Medical Corps and upon passing the examinations prescribed by the President for promotion to the grade of captain in the Medical Corps: Provided further, That relative rank among captains in the Medical Corps, who have or shall have attained that rank by operation of law after a period of service fixed thereby, shall be determined by counting all the service rendered by them as officers in said corps and as assistant surgeons in the Regular Army, subject, however, to loss of files by reason of sentence of court-martial or by reason of failure to pass examination for promotion: Provided further, That hereafter the President shall be authorized to detail not to exceed five officers of the Medical Department of the Army for duty with the military relief division of the American National Red Cross.

The enlisted force of the Medical Department shall consist of the following personnel, who shall not be included in the effective strength of the Army nor counted as a part of the enlisted force provided by law: Master hospital sergeants, hospital sergeants, sergeants (first-class), sergeants, corporals, cooks, horseshoers, saddlers, farriers, mechanics, privates (first-class), and privates: Provided, That master hospital sergeants shall be appointed by the Secretary of War, but no person shall be appointed master hospital sergeant until he shall have passed a satisfactory examination under such regulations as the Secretary of War may prescribe before a board of one or more medical officers as to his qualifications for the position, including knowledge of pharmacy, and demonstrated his fitness therefor by service of not less than twelve months as hospital sergeant or sergeant, first class, Medical Department, or as sergeant, first class, in the Hospital Corps now established by law; and no person shall be designated for such examination except by written authority of the Surgeon General: Provided further, That original enlistments for the Medical Department shall be made in the grade of private, and reenlistments and promotions of enlisted men therein, except as hereinbefore prescribed, and transfers thereto from the enlisted force of the line or other staff departments and corps of the Army shall be governed by such regulations as the Secretary of War may prescribe: Provided further, That the enlisted men of the Hospital Corps who are in active service at the time of the approval of this Act are hereby transferred to the corresponding grades of the Medical Department established by this Act: Provided further, That the total number of enlisted men in the Medical Department shall be approximately equal to, but not exceed, except as hereinafter provided, the equivalent of five per centum of the total enlisted strength of the Army authorized from time to time by law: Provided further, That in time of actual or threatened hostilities, the Secretary of War is hereby authorized to enlist or cause to be enlisted in the Medical Department such additional number of men as the service may require: Provided further,

That the number of enlisted men in each of the several grades designated below shall not exceed, except as hereinafter provided, the following percentages of the total authorized enlisted strength of the Medical Department, to wit: Master hospital sergeants, one-half of one per centum; hospital sergeants, one-half of one per centum; sergeants, first class, seven per centum; sergeants, eleven per centum; corporals, five per centum; and cooks, six per centum: Provided further, That the number of horseshoers, saddlers, farriers, and mechanics in the Medical Department shall not exceed one each to each authorized ambulance company or like organization: Provided further, That in said department the number of privates, first class, shall not exceed twenty-five per centum of the number of privates: Provided further, That if by reason of a reduction by operation of law in the authorized enlisted strength of the Army aforesaid the number of noncommissioned officers of any grade in the Medical Department whose warrants were issued previously to such reduction shall for the time being exceed the percentage hereinabove specified for such grade, no promotion to such grade shall be made until the percentage of noncommissioned officers therein shall have been reduced below that authorized for such grade on the basis of the said reduced enlisted strength, nor thereafter so as to make the percentage of noncommissioned officers therein in excess of the percentage authorized on the basis of the said reduced enlisted strength; but noncommissioned officers may be reenlisted in the grades held by them previously to such reduction regardless of the percentages aforesaid; and when under this provision the number of noncommissioned officers of any grade exceeds the percentage specified, any noncommissioned officer thereof, not under charges, may be discharged on his own application: Provided further, That privates, first class, of the Medical Department shall be eligible for ratings for additional pay as follows: As dispensary assistant, \$2 a month; as nurse, \$3 a month; as surgical assistant, \$5 a month: Provided further, That no enlisted man shall receive more than one rating for additional pay under the provisions of this section, nor shall any enlisted man receive any additional pay under such rating unless he shall have actually performed the duties for which he shall be rated.

The President is hereby authorized to appoint and commission, by and with the advice and consent of the Senate, dental surgeons, who are citizens of the United States between the ages of twenty-one and twenty-seven years, at the rate of one for each one thousand enlisted men of the line of the Army. Dental surgeons shall have the rank, pay, and allowances of first lieutenants until they have completed eight years' service. Dental surgeons of more than eight but less than twenty-four years' service shall, subject to such examination as the President may prescribe, have the rank, pay, and allowances of captains. Dental surgeons of more than twenty-four years' service shall, subject to such examination as the President may prescribe, have the rank, pay, and allowances of major: Provided, That the total number of dental surgeons with rank, pay, and allowances of major shall not at any time exceed fifteen: And provided further,

That all laws relating to the examination of officers of the Medical Corps for promotion shall be applicable to dental surgeons.

Authority is hereby given to the Secretary of War to grant permission, by revocable license, to the American National Red Cross to erect and maintain on any military reservations within the jurisdiction of the United States buildings suitable for the storage of supplies, or to occupy for that purpose buildings erected by the United States, under such regulations as the Secretary of War may prescribe, such supplies to be available for the aid of the civilian population in case of serious national disaster.

Sec. 11. *Corps of Engineers.*—The Corps of Engineers shall consist of one Chief of Engineers, with the rank of brigadier general; twenty-three colonels; thirty lieutenant colonels; seventy-two majors; one hundred and fifty-two captains; one hundred and forty-eight first lieutenants; seventy-nine second lieutenants; and the enlisted men hereinafter enumerated. The Engineer troops of the Corps of Engineers shall consist of one band, seven regiments, and two mounted battalions.

Each regiment of Engineers shall consist of one colonel; one lieutenant colonel; two majors; eleven captains; twelve first lieutenants; six second lieutenants; two master engineers, senior grade; one regimental sergeant major; two regimental supply sergeants; two color sergeants; one sergeant bugler; one cook; one wagoner for each authorized wagon of the field and combat train, and two battalions.

Each battalion of a regiment of Engineers shall consist of one major, one captain, one battalion sergeant major; three master engineers, junior grade; and three companies. Each Engineer company (regimental) shall consist of one captain; two first lieutenants; one second lieutenant; one first sergeant; three sergeants, first-class; one mess sergeant; one supply sergeant; one stable sergeant; six sergeants; twelve corporals; one horseshoer; two buglers; one saddler; two cooks; nineteen privates, first class; and fifty-nine privates: Provided, That the President may, in his discretion, increase a regiment of Engineers by two master engineers, senior grade, and two sergeants; each battalion of a regiment of Engineers by three master engineers, junior grade; and each Engineer company (regimental) by two sergeants, six corporals, one cook, twelve privates, first class, and thirty-four privates.

The Engineer band shall consist of one band leader; one assistant band leader; one first sergeant; two band sergeants; four band corporals; two musicians, first class; four musicians, second class; thirteen musicians, third class; and two cooks.

Each battalion of mounted Engineers shall consist of one major; five captains; seven first lieutenants; three second lieutenants; one master engineer, senior grade; one battalion sergeant major; one battalion supply sergeant; three master engineers, junior grade; one corporal; one wagoner for each authorized wagon of the field and combat train; and three mounted companies. Each mounted Engineer company shall consist of one captain; two first lieutenants; one second lieutenant; one first sergeant; two sergeants, first class; one

mess sergeant; one supply sergeant; one stable sergeant; four sergeants; eight corporals; two horseshoers; one saddler; two cooks; two buglers; twelve privates, first class; and thirty-seven privates: Provided, That the President may, in his discretion, increase the battalions of mounted Engineers by one master engineer, senior grade; two sergeants; and three master engineers, junior grade; and a mounted Engineer company by two sergeants; three corporals; eight privates, first class; and twenty-four privates: Provided further, That appropriate officers to command the regiments, battalions, and companies herein authorized and for duty with and as staff officers of such organizations shall be detailed from the Corps of Engineers, and shall not be in excess of the numbers in each grade enumerated in this section. The enlisted force of the Corps of Engineers and the officers serving therewith shall constitute a part of the line of the Army.

Sec. 12. *The Ordnance Department.*—The Ordnance Department shall consist of one Chief of Ordnance, with the rank of brigadier general; ten colonels; fifteen lieutenant colonels; thirty-two majors; forty-two captains; forty-two first lieutenants; the ordnance sergeants, as now authorized by law, and such other enlisted men of grades now authorized by law as the President may direct: Provided, That ordnance sergeants shall be selected by the Secretary of War from the sergeants of the line or Ordnance Department who shall have served faithfully for eight years, including four years in the grade of noncommissioned officer: Provided further, That vacancies which may occur in the commissioned personnel of the Ordnance Department shall be subject to the provisions of sections twenty-six and twenty-seven of the Act approved February second, nineteen hundred and one, the Acts approved June twenty-fifth, nineteen hundred and six, and February twenty-fourth, nineteen hundred and fifteen, and Acts amendatory thereof relating to the Ordnance Department: Provided further, That hereafter the Secretary of War is authorized to detail not to exceed thirty lieutenants from the Army at large for duty as student officers in the establishments of the Ordnance Department for a period of two years; and the completion of the prescribed course of instruction shall constitute the examination for detail in the Ordnance Department.

Sec. 13. *The Signal Corps.*—The Signal Corps shall consist of one Chief Signal Officer, with the rank of brigadier general; three colonels; eight lieutenant colonels; ten majors; thirty captains; seventy-five first lieutenants; and the aviation section, which shall consist of one colonel; one lieutenant colonel; eight majors; twenty-four captains; and one hundred and fourteen first lieutenants, who shall be selected from among officers of the Army at large of corresponding grades or from among officers of the grade below, exclusive of those serving by detail in staff corps or departments, who are qualified as military aviators, and shall be detailed to serve as aviation officers for periods of four years unless sooner relieved; and the provisions of section twenty-seven of the Act of Congress approved February second, nineteen hundred and one, are hereby extended to apply to said aviation officers and to vacancies created in

any arm, corps, or department of the Army by the detail of said officers therefrom; but nothing in said Act or in any other law now in force shall be held to prevent the detail or redetail at any time, to fill a vacancy among the aviation officers authorized by this Act, of any officer who, during prior service as an aviation officer of the aviation section, shall have become proficient in military aviation.

Aviation officers may, when qualified therefor, be rated as junior military aviators or as military aviators, but no person shall be so rated until there shall have been issued to him a certificate to the effect that he is qualified for the rating, and no certificate shall be issued to any person until an aviation examining board, which shall be composed of three officers of experience in the aviation service and two medical officers, shall have examined him, under general regulations to be prescribed by the Secretary of War and published to the Army by the War Department, and shall have reported him to be qualified for the rating. No person shall receive the rating of military aviator until he shall have served creditably for three years as an aviation officer with the rating of a junior military aviator.

Each aviation officer authorized by this Act shall, while on duty that requires him to participate regularly and frequently in aerial flights, receive an increase of twenty-five per centum in the pay of his grade and length of service under his commission. Each duly qualified junior military aviator shall, while so serving, have the rank, pay, and allowances of one grade higher than that held by him under his commission if his rank under said commission be not higher than that of captain, and while on duty requiring him to participate regularly and frequently in aerial flights he shall receive in addition an increase of fifty per centum in the pay of his grade and length of service under his commission. Each military aviator shall, while so serving, have the rank, pay, and allowances of one grade higher than that held by him under his commission if his rank under said commission be not higher than that of captain, and while on duty requiring him to participate regularly and frequently in aerial flights he shall receive in addition an increase of seventy-five per centum of the pay of his grade and length of service under his commission: Provided further, That the provisions of the Act of March second, nineteen hundred and thirteen, allowing increase of pay and allowances to officers detailed by the Secretary of War on aviation duty, are hereby repealed: Provided further, That hereafter married officers of the line of the Army shall be eligible equally with unmarried officers, and subject to the same conditions, for detail to aviation duty; and the Secretary of War shall have authority to cause as many enlisted men of the aviation section to be instructed in the art of flying as he may deem necessary: Provided further, That hereafter the age of officers shall not be a bar to their first detail in the aviation section of the Signal Corps, and neither their age nor their rank shall be a bar to their subsequent details in said section: Provided further, That, when it shall be impracticable to obtain from the Army officers suitable for the aviation section of the Signal Corps in the number allowed by law the difference between that number and the number of suitable officers actually available for duty in said section may be

made up by appointments in the grade of aviator, Signal Corps, and that grade is hereby created. The personnel for said grade shall be obtained from especially qualified civilians who shall be appointed and commissioned in said grade: Provided further, That whenever any aviator shall have become unsatisfactory he shall be discharged from the Army as such aviator. The base pay of an aviator, Signal Corps, shall be \$150 per month, and he shall have the allowances of a master signal electrician and the same percentage of increase in pay for length of service as is allowed to a master signal electrician.

The total enlisted strength of the Signal Corps shall be limited and fixed from time to time by the President in accordance with the needs of the Army, and shall consist of master signal electricians; sergeants, first class; sergeants; corporals; cooks; horseshoers; private, first class; and privates; the number in each grade being fixed from time to time by the President. The numbers in the various grades shall not exceed the following percentages of the total authorized enlisted strength of the Signal Corps, namely: Master signal electricians, two per centum; sergeants, first class, seven per centum; sergeants, ten per centum; corporals, twenty per centum. The number of privates, first class, shall not exceed twenty-five per centum of the number of privates. Authority is hereby given the President to organize, in his discretion, such part of the commissioned and enlisted personnel of the Signal Corps into such number of companies, battalions, and aero squadrons as the necessities of the service may demand.

Sec. 14. *Bureau of Insular Affairs of the War Department.*—Nothing in this Act shall be construed to repeal existing laws relating to the organization of the Bureau of Insular Affairs of the War Department.

Sec. 15. *Chaplains.*—The President is authorized to appoint, by and with the advice and consent of the Senate, chaplains in the Army at the rate of not to exceed, including chaplains now in service, one for each regiment of Cavalry, Infantry, Field Artillery, and Engineers and one for each one thousand two hundred officers and men of the Coast Artillery Corps, with rank, pay, and allowances as now authorized by law: Provided, That in the appointment of chaplains in the Regular Army, preference and priority shall be given to applicant veterans, if otherwise duly qualified and who shall not have passed the age of forty-one years at the time of application, who have rendered honorable war service in the Army of the United States or who have been honorably discharged from such Army.

Sec. 16. *Veterinarians.*—The President is hereby authorized, by and with the advice and consent of the Senate, to appoint veterinarians and assistant veterinarians in the Army, not to exceed, including veterinarians now in service, two such officers for each regiment of Cavalry, one for every three batteries of Field Artillery, one for each mounted battalion of Engineers, seventeen as inspectors of horses and mules and as veterinarians in the Quartermaster Corps, and seven as inspectors of meats for the Quartermaster Corps; and said veterinarians and assistant veterinarians shall be citizens of the United States and shall constitute the Veterinary Corps and shall be a part of the Medical Department of the Army.

Hereafter a candidate for appointment as assistant veterinarian must be a citizen of the United States, between the ages of twenty-one and twenty-seven years, a graduate of a recognized veterinary college or university, and shall not be appointed until he shall have passed a satisfactory examination as to character, physical condition, general education, and professional qualifications.

An assistant veterinarian appointed under this Act shall, for the first five years of service as such, have the rank, pay, and allowances of second lieutenant; that after five years of service he shall have the rank, pay, and allowances of first lieutenant; that after fifteen years of service he shall be promoted to be a veterinarian with the rank, pay, and allowances of captain, and that after twenty years' service he shall have the rank, pay, and allowances of a major: Provided, That any assistant veterinarian, in order to be promoted as hereinbefore provided, must first pass a satisfactory examination, under such rules as the President may prescribe, as to professional qualifications and adaptability for the military service; and if such assistant veterinarian shall be found deficient at such examination he shall be discharged from the Army with one year's pay.

The veterinarians of Cavalry and Field Artillery now in the Army, together with such veterinarians of the Quartermaster Corps as are now employed in said corps, who at the date of the approval of this Act shall have had less than five years' governmental service, may be appointed in the Veterinary Corps as assistant veterinarians with the rank, pay, and allowances of second lieutenant; those who shall have had over five years of such service may be appointed in said corps as assistant veterinarians with the rank, pay, and allowances of first lieutenant; and those who shall have had over fifteen years of such service may be appointed in said corps as veterinarians with the rank, pay, and allowances of captain: Provided, That no such appointment of any veterinarian shall be made unless he shall first pass satisfactorily a practical professional and physical examination as to his fitness for the military service: Provided further, That veterinarians now in the Army or in the employ of the Quartermaster Corps who shall fail to pass the prescribed physical examination because of disability incident to the service and sufficient to prevent them from the performance of duty valuable to the Government shall be placed upon the retired list of the Army with seventy-five per centum of the pay to which they would have been entitled if appointed in the Veterinary Corps as hereinbefore prescribed.

The Secretary of War, upon recommendation of the Surgeon General of the Army, may appoint in the Veterinary Corps, for such time as their services may be required, such number of reserve veterinarians as may be necessary to attend public animals pertaining to the Quartermaster Corps. Reserve veterinarians so employed shall have the pay and allowances of second lieutenant during such employment and no longer: Provided, That such reserve veterinarians shall be graduates of a recognized veterinary college or university and shall pass a satisfactory examination as to character, physical condition, general education, and professional qualifications in like manner as hereinbefore required of assistant veterinarians; such reserve veteri-

narians shall constitute a list of eligibles for appointment as assistant veterinarians, subject to all the conditions hereinbefore prescribed for the appointment of assistant veterinarians.

Within a limit of time to be fixed by the Secretary of War, candidates for appointment as assistant veterinarians who shall have passed satisfactorily the examinations prescribed for that grade by this Act shall be appointed, in the order of merit in which they shall have passed such examination, to vacancies as they occur, such appointments to be for a probationary period of two years, after which time, if the services of the probationers shall have been satisfactory, they shall be permanently appointed with rank to date from the dates of rank of their probationary appointments. Probationary veterinarians whose services are found unsatisfactory shall be discharged at any time during the probationary period, or at the end thereof, and shall have no further claims against the Government on account of their probationary service.

The Secretary of War shall from time to time appoint boards of examiners to conduct the veterinary examinations hereinbefore prescribed, each of said boards to consist of three medical officers and two veterinarians.

Sec. 17. *Composition of Infantry units.*—Each regiment of Infantry shall consist of one colonel, one lieutenant colonel, three majors, fifteen captains, sixteen first lieutenants, fifteen second lieutenants, one headquarters company, one machine-gun company, one supply company, and twelve Infantry companies organized into three battalions of four companies each.

Each battalion shall consist of one major, one first lieutenant, mounted (battalion adjutant), and four companies. Each Infantry company in battalion shall consist of one captain, one first lieutenant, one second lieutenant, one first sergeant, one mess sergeant, one supply sergeant, six sergeants, eleven corporals, two cooks, two buglers, one mechanic, nineteen privates (first class), and fifty-six privates.

Each Infantry headquarters company shall consist of one captain, mounted (regimental adjutant); one regimental sergeant major, mounted; three battalion sergeants major, mounted; one first sergeant (drum major); two color sergeants; one mess sergeant; one supply sergeant; one stable sergeant; one sergeant; two cooks; one horseshoer; one band leader; one assistant band leader; one sergeant bugler; two band sergeants; four band corporals; two musicians, first class; four musicians, second class; thirteen musicians, third class; four privates, first class, mounted; and twelve privates mounted.

Each Infantry machine-gun company shall consist of one captain, mounted; one first lieutenant, mounted; two second lieutenants, mounted; one first sergeant, mounted; one mess sergeant; one supply sergeant, mounted; one stable sergeant, mounted; one horseshoer; five sergeants; six corporals; two cooks; two buglers; one mechanic; eight privates, first class; and twenty-four privates.

Each Infantry supply company shall consist of one captain,

mounted; one second lieutenant, mounted; three regimental supply sergeants, mounted; one first sergeant, mounted; one mess sergeant; one stable sergeant; one corporal, mounted; one cook; one saddler; one horseshoer; and one wagoner for each authorized wagon of the field and combat train: Provided, That the President may in his discretion increase a company of Infantry by two sergeants, six corporals, one cook, one mechanic, nine privates (first class), and thirty-one privates; an Infantry machine-gun company by two sergeants, two corporals, one mechanic, four privates, first class, and twelve privates.

The commissioned officers required for the Infantry headquarters, supply, and machine-gun companies and for the companies organized into battalions shall be assigned from those hereinbefore authorized.

Sec. 18. *Composition of Cavalry units.*—Each regiment of Cavalry shall consist of one colonel, one lieutenant colonel, three majors, fifteen captains, sixteen first lieutenants, sixteen second lieutenants, one headquarters troop, one machine-gun troop, one supply troop, and twelve troops organized into three squadrons of four troops each.

Each squadron shall consist of one major, one first lieutenant (squadron adjutant), and four troops. Each troop in squadron shall consist of one captain, one first lieutenant, one second lieutenant, one first sergeant, one mess sergeant, one supply sergeant, one stable sergeant, five sergeants, eight corporals, two cooks, two horseshoers, one saddler, two buglers, ten privates (first class), and thirty-six privates.

Each headquarters troop shall consist of one captain (regimental adjutant), one regimental sergeant major, three squadron sergeants major, one first sergeant (drum major), two color sergeants, one mess sergeant, one supply sergeant, one stable sergeant, one sergeant, two cooks, one horseshoer, one saddler, two privates (first class), and nine privates, one band leader, one assistant band leader, one sergeant bugler, two band sergeants, four band corporals, two musicians (first class), four musicians (second class), and thirteen musicians (third class).

Each machine-gun troop shall consist of one captain, one first lieutenant, two second lieutenants, one first sergeant, one mess sergeant, one supply sergeant, one stable sergeant, two horseshoers, five sergeants, six corporals, two cooks, one mechanic, one saddler, two buglers, twelve privates (first class), and thirty-five privates.

Each supply troop shall consist of one captain (regimental supply officer), two second lieutenants, three regimental supply sergeants, one first sergeant, one mess sergeant, one stable sergeant, one corporal, one cook, one horseshoer, one saddler, and one wagoner for each authorized wagon of the field and combat train: Provided, That the President may, in his discretion, increase each troop of Cavalry by ten privates (first class) and twenty-five privates; the headquarters troop by two sergeants, five corporals, one horseshoer, five privates (first class), and eighteen privates; each machine-gun troop by three sergeants, two corporals, one mechanic, one private (first class), and fourteen privates; each supply troop by one corporal, one cook, one saddler, and one horseshoer.

The commissioned officers required for the Cavalry headquarters, supply, and machine-gun troops, and for the troops organized into squadrons, shall be assigned from those hereinbefore authorized.

Sec. 19. *Composition of Field Artillery units.*—The Field Artillery, including mountain artillery, light artillery, horse artillery, heavy artillery (field and siege types), shall consist of one hundred and twenty-six gun or howitzer batteries organized into twenty-one regiments.

In time of actual or threatened hostilities the President is authorized to organize such number of ammunition batteries and battalions, depot batteries and battalions, and such artillery parks with such numbers and grades of personnel and such organizations as he may deem necessary. The officers necessary for such organization shall be supplied from the Officers' Reserve Corps provided by this Act and by temporary appointment as authorized by section eight of the Act of Congress approved April twenty-fifth, nineteen hundred and fourteen. The enlisted men necessary for such organizations shall be supplied from the Regular Army Reserve provided by this Act or from the Regular Army.

Each regiment of Field Artillery shall consist of one colonel, one lieutenant colonel, one captain, one headquarters company, one supply company, and such number of gun and howitzer battalions as the President may direct. Nothing shall prevent the assembling, in the same regiment, of gun and howitzer battalions of different calibers and classes.

Each gun or howitzer battery shall consist of one captain, two first lieutenants, two second lieutenants, one first sergeant, one supply sergeant, one stable sergeant, one mess sergeant, six sergeants, thirteen corporals, one chief mechanic, one saddler, two horseshoers, one mechanic, two buglers, three cooks, twenty-two privates (first class), and seventy-one privates. When no enlisted men of the Quartermaster Corps are attached for such positions there shall be added to each battery of mountain artillery one packmaster (sergeant, first class), one assistant packmaster (sergeant), and one cargador (corporal).

Each headquarters company of a regiment of two battalions shall consist of one captain, one first lieutenant, one regimental sergeant major, two battalion sergeants major, one first sergeant, two color sergeants, one mess sergeant, one supply sergeant, one stable sergeant, two sergeants, nine corporals, one horseshoer, one saddler, one mechanic, three buglers, two cooks, five privates (first class), fifteen privates, one band leader, one assistant band leader, one sergeant bugler, two band sergeants, four band corporals, two musicians (first class), four musicians (second class), and thirteen musicians (third class). That when a regiment consists of three battalions there shall be added to the headquarters company one battalion sergeant major, one sergeant, three corporals, one bugler, one private (first class), and five privates. When no enlisted men of the Quartermaster Corps is attached for such positions, there shall be added to each mountain artillery headquarters company one packmaster (sergeant, first class), one assistant packmaster (sergeant), and one cargador (corporal).

Each supply company of a regiment of two battalions shall consist of one captain, one first lieutenant, two regimental supply sergeants, one first sergeant, one mess sergeant, one corporal, one cook, one horseshoer, one saddler, two privates, and one wagoner for each authorized wagon of the field train. When a regiment consists of three battalions there shall be added to the supply company one second lieutenant, one regimental supply sergeant, one private, and one wagoner for each additional authorized wagon of the field train.

Each gun or howitzer battalion shall consist of one major, one captain, and batteries as follows: Mountain artillery battalions and light artillery gun or howitzer battalions serving with the field artillery of Infantry divisions shall contain three batteries; horse artillery battalions and heavy field artillery gun or howitzer battalions shall contain two batteries: Provided, That the President may, in his discretion, increase the headquarters company of a regiment of two battalions by two sergeants, five corporals, one horseshoer, one mechanic, one private (first class), and six privates; the headquarters company of a regiment of three battalions by one sergeant, seven corporals, one horseshoer, one mechanic, two cooks, two privates (first class), and seven privates; the supply company of a regiment of two battalions by one corporal, one cook, one horseshoer, and one saddler; the supply company for a regiment of three battalions by one corporal, one cook, one horseshoer, and one saddler; a gun or howitzer battery by three sergeants, seven corporals, one horseshoer, two mechanics, one bugler, thirteen privates (first class), and thirty-seven privates.

Sec. 20. *Coast Artillery Corps.*—The Coast Artillery Corps shall consist of one Chief of Coast Artillery, with the rank of brigadier general; twenty-four colonels; twenty-four lieutenant colonels; seventy-two majors; three hundred and sixty captains; three hundred and sixty first lieutenants; three hundred and sixty second lieutenants; thirty-one sergeants major, senior grade; sixty-four sergeants major, junior grade; forty-one master electricians; seventy-two engineers; ninety-nine electrician sergeants, first class; two hundred and seventy-five assistant engineers; ninety-nine electrician sergeants, second class; one hundred and six firemen; ninety-three radio sergeants; sixty-two master gunners; two hundred and sixty-three first sergeants; two hundred and sixty-three supply sergeants; two hundred and sixty-three mess sergeants; two thousand one hundred and four sergeants; three thousand one hundred and fifty-six corporals; five hundred and twenty-six cooks; five hundred and twenty-six mechanics; five hundred and twenty-six buglers; five thousand two hundred and twenty-five privates, first class; fifteen thousand six hundred and seventy-five privates; and eighteen bands, organized as hereinbefore provided for the Engineer band. The rated men of the Coast Artillery Corps shall consist of casemate electricians; observers, first class; plotters; chief planters; coxswains; chief loaders; observers, second class; gun commanders and gun pointers. The total number of rated men shall not exceed one thousand seven hundred and eighty-four. Coxswains shall receive \$9 per month in addition to the pay of their grade.

Sec. 21. *Porto Rico Regiment of Infantry.*—The Porto Rico Regiment of Infantry of the United States Army shall hereafter have the same organization, and the same grades and numbers of commissioned officers and enlisted men, as are by this Act or shall hereafter be prescribed by law for other regiments of Infantry of the Army. All vacancies created by this Act or occurring hereafter in commissioned offices of said regiment above the grade of second lieutenant and below the grade of colonel shall, except as hereinafter provided to the contrary, be filled by promotion according to seniority in the several grades and within the regiment, subject to the examination prescribed by section three of the Act of Congress approved October first, eighteen hundred and ninety, and said section is hereby extended so as to apply in the cases of all officers below the grade of lieutenant colonel who shall hereafter be examined for promotion in the Porto Rico Regiment of Infantry, except that the President may prescribe such a system of examination for the promotion of officers of said regiment as he may deem advisable.

The colonel of said regiment shall be detailed by the President, from among officers of Infantry of the Army not below the grade of lieutenant colonel, for a period of four years unless sooner relieved. Vacancies created by this Act in the grades of lieutenant colonel and major in said regiment shall be filled by appointments from the senior captains in regimental rank of the Porto Rico regiment mentioned in the Act of March fourth, nineteen hundred and fifteen; and captains and lieutenants of said regiment shall also be eligible for such detached service, transfer, or assignment to duty with other organizations as may be approved by the Secretary of War; but vacancies created by such detachment of officers shall not be filled by promotions or appointments.

All men hereafter enlisting in said regiment shall be natives of Porto Rico. All enlistments in the regiment shall hereafter be the same as is provided herein for the Regular Army, and the regiment, or any part thereof, may be ordered for service outside the island of Porto Rico. The pay and allowances of members of said regiment shall be the same as provided by law for officers and enlisted men of like grades in the Regular Army.

Vacancies created by this Act or occurring hereafter in the grade of second lieutenant in said regiment shall be filled during any calendar year by the appointment by the President, by and with the advice and consent of the Senate, of any native of Porto Rico graduated from the United States Military Academy, and, after such appointment shall have been made or provided for, by like appointment of native citizens of Porto Rico between twenty-one and twenty-seven years of age.

Provided, That officers of the Porto Rico Regiment of Infantry, United States Army, who held commissions in the Porto Rico Provisional Regiment of Infantry on June thirtieth, nineteen hundred and eight, shall now and hereafter take rank in their grades in the same relative order held by them in said Porto Rico Provisional Regiment of Infantry on June thirtieth, nineteen hundred and eight, subject to

any loss in rank due to failure to pass examinations for promotion or to sentence of court-martial.

Sec. 22. All existing laws pertaining to or affecting the United States Military Academy and civilian or military personnel on duty thereat in any capacity whatever, the officers and enlisted men on the retired list, the detached and additional officers under the Act of Congress approved March third, nineteen hundred and eleven, recruiting parties, recruit depots and unassigned recruits, service school detachments, United States disciplinary barracks guards, disciplinary organizations, the Philippine scouts, and Indian scouts shall continue and remain in force except as herein specifically provided otherwise.

Sec. 23. *Original appointments to be provisional.*—Hereafter all appointments of persons other than graduates of the United States Military Academy to the grade of second lieutenant in the Regular Army shall be provisional for a period of two years, at the close of which period such appointments shall be made permanent if the appointees shall have demonstrated, under such regulations as the President may prescribe, their suitability and moral, professional, and physical fitness for such permanent appointment, but should any appointee fail so to demonstrate his suitability and fitness, his appointment shall terminate; and should any officer become eligible for promotion to a vacancy in a higher grade and qualify therefore before the expiration of two years from the date of his original appointment, he shall receive a provisional appointment in such higher grade, which appointment shall be made permanent when he shall have qualified for permanent appointment upon the expiration of two years from the date of his original appointment, or shall terminate if he shall fail so to qualify.

Sec. 24. *Increase to be made in five increments.*—Except as otherwise specifically provided by this Act, the increases in the commissioned and enlisted personnel of the Regular Army provided by this Act shall be made in five annual increments, each of which shall be, in each grade of each arm, corps, and department, as nearly as practicable, one-fifth of the total increase authorized for each arm, corps, and department. Officers promoted to vacancies created or caused by the addition of the first increment shall be promoted to rank from July first, nineteen hundred and sixteen, and those promoted to vacancies created or caused by the second increment shall be promoted to rank from July first, nineteen hundred and seventeen; those promoted to vacancies created or caused by the addition of the third increment shall be promoted to rank from July first, nineteen hundred and eighteen; those promoted to vacancies created or caused by the addition of the fourth increment shall be promoted to rank from July first, nineteen hundred and nineteen; and those promoted to vacancies created or caused by the addition of the fifth increment shall be promoted to rank from July first, nineteen hundred and twenty: Provided, That in the event of actual or threatened war or similar emergency in which the public safety demands it the President is authorized to immediately organize the entire increase authorized by this Act, or so much thereof as he may deem necessary, and when, in the judgment of the President, war becomes imminent, all of said organizations that shall then be below the maximum enlisted strength

authorized by law shall be raised forthwith to that strength, and shall be maintained as nearly as possible thereat so long as war, or the imminence of war, shall continue.

Vacancies in the grade of second lieutenant, created or caused by the increases due to this Act, in any fiscal year shall be filled by appointment in the following order: (1) Of cadets graduated from the United States Military Academy during the preceding fiscal year for whom vacancies did not become available during the fiscal year in which they were graduated; (2) under the provisions of existing law, of enlisted men, including officers of the Philippine Scouts, whose fitness for promotion shall have been determined by competitive examination; (3) of members of the Officers' Reserve Corps between the ages of twenty-one and twenty-seven years; (4) of commissioned officers of the National Guard between the ages of twenty-one and twenty-seven years; (5) of such honor graduates, between the ages of twenty-one and twenty-seven years, of distinguished colleges as are now or may hereafter be entitled to preference by general orders of the War Department; and (6) of candidates from civil life between the ages of twenty-one and twenty-seven years; and the President is authorized to make the necessary rules and regulations to carry these provisions into effect: Provided, That any such original vacancies not so filled, and remaining at the time of graduation of any class at the United States Military Academy, may be filled by the appointment of members of that class; and all vacancies in the grade of second lieutenant not created or caused by the increases due to this Act shall be filled as provided in the Act making appropriation for the support of the Army, approved March third, nineteen hundred and eleven: Provided further, That enlisted men of the Regular Army who have completed one year's service with an organization may become candidates for vacancies in the grade of second lieutenant created or caused by the increases due to the operation of this Act: Provided further, That appointments to the grade of second lieutenant in the Corps of Engineers including those created by this Act, shall continue to be made as now provided by law, but that officers of the Army or Navy of the United States may become candidates for said appointments under the provisions of section five of the Act of Congress approved February twenty-seventh, nineteen hundred and eleven, without previously vacating their commissions as officers and that the Secretary of War may, in his discretion, allow persons to become candidates without previously establishing eligibility for appointment as junior engineer under the Engineer Bureau of the War Department: Provided further, That officers appointed to original vacancies in the grade of second lieutenant created or caused by this Act shall take lineal and relative rank according to dates of appointment, and the lineal and relative rank of second lieutenants appointed on the same date shall be determined under such regulations as the Secretary of War may prescribe: Provided further, That the President may re-commission persons who have heretofore held commissions in the Regular Army and have left the service honorably, after ascertaining that they are qualified for service physically, morally, and as to age and military fitness; such recommissioned officers shall take rank

at the foot of the respective grades which they held at the time of their separation from the Army: Provided further, That the provisions of existing law requiring examinations to determine fitness for promotion of officers of the Army are hereby extended to include promotions to all grades below that of brigadier general: Provided further, That examinations of officers in the grades of major and lieutenant colonel shall be confined to problems involving the higher functions of staff duties and command: And provided further, That in time of war retired officers of the Army may be employed on active duty, in the discretion of the President, and when so employed they shall receive the full pay and allowances of their grade: And provided further, That hereafter any retired officer, who has been or shall be detailed on active duty, shall receive the rank, pay, and allowances of the grade, not above that of major, that he would have attained in due course of promotion if he had remained on the active list for a period beyond the date of his retirement equal to the total amount of time during which he has been detailed on active duty since his retirement.

Sec. 25. *The detached officers.*—That on July first, nineteen hundred and sixteen, the line of the Army shall be increased by eight hundred and twenty-two extra officers of the Cavalry, Field Artillery, Coast Artillery Corps, and Infantry arms of the service, of grades from first lieutenant to colonel, inclusive, lawfully available for detachment from their proper arms for duty with the National Guard, or other duty, the usual period of which exceeds one year. Said extra officers, together with the two hundred detached officers provided for by the Act of Congress approved March third, nineteen hundred and eleven, shall, on and after July first, nineteen hundred and sixteen, constitute the Detached Officers' List, and all positions vacated by officers assigned to said list, and the officers so assigned, shall be subject to the provisions of section twenty-seven of the Act of Congress approved February second, nineteen hundred and one, with reference to details to the staff corps. The total number of officers hereby authorized for each grade on said list entire shall be in proportion to the total number of officers of the corresponding grade now authorized by law other than this Act for all of the said four arms combined, exclusive of second lieutenants and of the two hundred extra officers authorized by the Act of Congress approved March third, nineteen hundred and eleven, and exclusive also of the additional officers authorized by the Act to restore lineal rank lost through the system of regimental promotion formerly in force; and the total number of officers hereby authorized for each grade in each of said arms on said list shall be in the proportion borne by the number of officers now authorized by law other than this Act for such grade and arm to the total number of officers now authorized by law other than this Act for the corresponding grade in all of the said four arms combined, exclusive of the extra and additional officers last hereinbefore specified and excluded: Provided, That all vacancies created or caused by the foregoing provisions of this section in grades above that of second lieutenant shall be filled by promotion according to law existing on and before the date of approval of this Act,

and subject to the examinations prescribed by existing law. As soon as practicable after such promotions shall have been made, there shall be detached from each arm and assigned to the Detached Officers' List a number of officers of each grade equal to the number of officers of said grade by which said arm shall have been increased by the foregoing provisions of this section; and thereafter any vacancy created or caused in any of the said arms of the service by the assignment of an officer of any grade to said Detached Officers' List shall be filled, subject to such examination as is now or may hereafter be prescribed by law, by the promotion of the officer who shall be the senior in length of commissioned service of those eligible to promotion in the next lower grade in the arm in which such vacancy shall occur: Provided further, That no officer of any of said arms of the service shall be permitted to remain on said Detached Officers' List for more than forty-five days unless he shall have been actually present for duty for at least two years out of the last preceding six years with an organization composed of one or more statutory units, or the equivalent thereof, of the arm to which he shall belong. Any vacancy created in said list by the removal of any officer therefrom because he shall not have been present for duty as before prescribed in this proviso shall be filled by the transfer to said list of an officer having the same grade and belonging to the same arm as the officer whose removal from said list shall have created said vacancy; but, except as before prescribed in this proviso, all officers who shall have been assigned to said list shall remain thereon for not less than four years from the respective dates of their assignment thereto, unless in the meantime they shall have been separated entirely from the Army, or shall have been promoted or appointed to higher offices, or shall have been retired from active service: Provided further, That after the apportionment of officers to said Detached Officers' List shall have been made as authorized by this Act, whenever any vacancy shall have been caused in said list by the separation of an officer of any grade therefrom, such vacancy shall, except as prescribed in the last preceding proviso, be filled by the detail and assignment to said list of an officer of the corresponding grade in that arm in which there shall be found the officer of the next lower grade who at that time shall be the senior in length of commissioned service of all the officers of the said lower grade in all of the four arms hereinbefore specified; if two or more officers of different arms shall be found to have equal seniority in length of commissioned service in said lower grade, the question of seniority shall be decided by their relative standing on the list of the commissioned officers of the Army: Provided further, That, with a view further to equalize inequalities in past promotions of officers of the line of the Army, on July first, nineteen hundred and sixteen, the Cavalry shall be increased by seventeen colonels, and the Infantry by four colonels, all of whom shall be additional officers in that grade, and shall not bar nor retard the promotion to which any officer would be entitled if the appointment of the said additional officers had never been authorized; and after July first, nineteen hundred and nineteen, no vacancies occurring among the said additional officers shall be filled and the offices so vacated shall cease

and determine: And provided further, That for the purpose of lessening as much as possible inequalities of promotion due to the increase in the number of officers of the line of the Army under the provisions of this Act, any vacancies created or caused by this Act in commissioned grades below that of lieutenant colonel in any arm of said line may, in the discretion of the President and under such regulations as he may prescribe in furtherance of the purpose stated in this proviso, be filled by the promotion or transfer without promotion of officers of other branches of the line of the Army; but no such promotion or transfer shall be made in the case of any officer unless it shall have been recommended by an examining board composed of five officers, senior in rank to such officer, and of the arm to which the promotion or transfer of such officer shall have been proposed, who, after having made a personal examination of such officer and of his official record, shall have reported him qualified for service in said arm in the grade to which his promotion or transfer shall have been proposed.

Sec. 26. *Retirement of officers of Philippine Scouts.*—Captains and lieutenants of Philippine Scouts who are citizens of the United States shall hereafter be entitled to retirement under the laws governing the retirement of enlisted men of the Regular Army, except that they shall be retired in the grade held by them at the date of retirement, shall be entitled to retirement for disability under the same conditions as officers of the Regular Army, and that they shall receive, as retired pay, the amounts allowed by law, as retired pay and allowances, of master signal electricians of the United States Army, and no more: Provided, That double time for service beyond the continental limits of the United States shall not be counted for the purposes of this section so as to reduce the actual period of service below twenty years: Provided further, That former officers of the Philippine Scouts who, because of disability occasioned by wounds received in action, have resigned or been discharged from the service, or who have heretofore served as such for a period of more than five years and have been retired as enlisted men, shall be placed upon the retired list as officers of Philippine Scouts and thereafter receive the retired pay and allowances provided by this section for other officers of Philippine Scouts: And provided further, That any former officer of Philippine Scouts who vacated his office in the Philippine Scouts by discharge or resignation on account of disability contracted in the line of duty and who was subsequently retired as an enlisted man, except any former officer of Philippine Scouts who has been retired as an enlisted man by special Act of Congress, shall be transferred to the retired list created by this section and shall thereafter receive the retired pay and allowances authorized by this section, and no more. Officers of Philippine Scouts retired under the provisions of this section shall not form part of the limited retired list now authorized by law.

Sec. 27. *Enlistments in the Regular Army.*—On and after the first day of November, nineteen hundred and sixteen, all enlistments in the Regular Army shall be for a term of seven years, the first three years to be in the active service with the organizations of which those

enlisted form a part and, except as otherwise provided herein, the last four years in the Regular Army Reserve hereinafter provided for: Provided, That at the expiration of three years' continuous service with such organizations, either under a first or any subsequent enlistment, any soldier may be reenlisted for another period of seven years, as above provided for, in which event he shall receive his final discharge from his prior enlistment: Provided further, That after the expiration of one year's honorable service any enlisted man serving within the continental limits of the United States whose company, troop, battery, or detachment commander shall report him as proficient and sufficiently trained may, in the discretion of the Secretary of War, be furloughed to the Regular Army Reserve under such regulations as the Secretary of War may prescribe, but no man furloughed to the reserve shall be eligible to reenlist in the service until the expiration of his term of seven years: Provided further, That in all enlistments hereafter accomplished under the provisions of this Act three years shall be counted as an enlistment period in computing continuous-service pay: Provided further, That any noncommissioned officer discharged with an excellent character shall be permitted, at the expiration of three years in the active service, to reenlist in the organization from which discharged with the rank and grade held by him at the time of his discharge if he reenlists within twenty days after the date of such discharge: Provided further, That no person under the age of eighteen years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians, provided that such minor has such parents or guardians entitled to his custody and control: And provided further, That the President is authorized in his discretion to utilize the services of postmasters of the second, third, and fourth classes in procuring the enlistment of recruits for the Army, and for each recruit accepted for enlistment in the Army, the postmaster procuring his enlistment shall receive the sum of \$5.

In addition to military training, soldiers while in the active service shall hereafter be given the opportunity to study and receive instruction upon educational lines of such character as to increase their military efficiency and enable them to return to civil life better equipped for industrial, commercial, and general business occupations. Civilian teachers may be employed to aid the Army officers in giving such instruction, and part of this instruction may consist of vocational education either in agriculture or the mechanic arts. The Secretary of War, with the approval of the President, shall prescribe rules and regulations for conducting the instruction herein provided for and the Secretary of War shall have the power at all times to suspend, increase, or decrease the amount of such instruction offered as may in his judgment be consistent with the requirements of military instruction and service of the soldiers.

Sec. 28. *Pay of certain enlisted men.*—Hereafter the monthly pay of enlisted men of certain grades of the Army created in this Act shall be as follows, namely: Quartermaster sergeant, senior grade, Quartermaster Corps; master hospital sergeant, Medical Department; master engineer, senior grade, Corps of Engineers; and band leader,

Infantry, Cavalry, Artillery, and Corps of Engineers, \$75; hospital sergeant, Medical Department; and master engineer, junior grade, Corps of Engineers, \$65; sergeant, first class, Medical Department, \$50; sergeant, first class, Corps of Engineers; regimental supply sergeant, Infantry, Cavalry, Field Artillery, and Corps of Engineers; battalion supply sergeant, Corps of Engineers; and assistant engineer, Coast Artillery Corps, \$45; assistant band leader, Infantry, Cavalry, Artillery, and Corps of Engineers; and sergeant bugler, Infantry, Cavalry, Artillery, and Corps of Engineers, \$40; musician first class, Infantry, Cavalry, Artillery, and Corps of Engineers; supply sergeant, mess sergeant, and stable sergeant, Corps of Engineers; sergeant Medical Department, \$36; supply sergeant, Infantry, Cavalry, and Artillery; mess sergeant, Infantry, Cavalry, and Artillery; cook, Medical Department; horseshoer, Infantry, Cavalry, Artillery, Corps of Engineers, Signal Corps, and Medical Department; stable sergeant, Infantry and Cavalry; radio sergeant, Coast Artillery Corps; and musicians, second class, Infantry, Cavalry, Artillery and Corps of Engineers, \$30; musician, third class, Infantry, Cavalry, Artillery, and Corps of Engineers; corporal, Medical Department \$24; saddler, Infantry, Cavalry, Field Artillery, Corps of Engineers, and Medical Department; mechanic, Infantry, Cavalry, and Field Artillery, and Medical Department; farrier, Medical Department; and wagoner, Infantry, Field Artillery, and Corps of Engineers, \$21; private, first class, Infantry, Cavalry, Artillery, and Medical Department, \$18; private, Medical Department, and bugler, \$15. Nothing herein contained shall operate to reduce the pay or allowances now authorized by law for any grade of enlisted men of the Army.

Sec. 29. *Final discharge of enlisted men.*—No enlisted man in the Regular Army shall receive his final discharge until the termination of his seven-year term of enlistment except upon reenlistment as provided for in this Act or as provided by law for discharge prior to expiration of term of enlistment, but when an enlisted man is furloughed to the Regular Army Reserve his account shall be closed and he shall be paid in full to the date such furlough becomes effective, including allowances provided by law for discharged soldiers: Provided, That when by reason of death or disability of a member of the family of an enlisted man occurring after his enlistment members of his family become dependent upon him for support, he may, in the discretion of the Secretary of War, be discharged from the service of the United States or be furloughed to the Regular Army Reserve, upon due proof being made of such condition: Provided further, that when an enlisted man is discharged by purchase while in active service he shall be furloughed to the Regular Army Reserve, unless, in the discretion of the Secretary of War, he is given a final discharge from the Army.

Sec. 30. *Composition of the Regular Army Reserve.*—The Regular Army Reserve shall consist of, first, all enlisted men now in the Army Reserve or who shall hereafter become members of the Army Reserve under the provisions of existing law; second, all enlisted men furloughed to or enlisted in the Regular Army Reserve under

the Act approved April twenty-fifth, nineteen hundred and fourteen, as officers of the Quartermaster Corps and other staff corps and departments, as officers for recruit rendezvous and depots, and as officers of volunteers, there shall be organized, under such rules and regulations as the President may prescribe not inconsistent with the provisions of this Act, an Officers' Reserve Corps of the Regular Army. Said corps shall consist of sections corresponding to the various arms, staff corps, and departments of the Regular Army. Except as otherwise herein provided, a member of the Officers' Reserve Corps shall not be subject to call for service in time of peace, and whenever called upon for service shall not, without his consent, be so called in a lower grade than that held by him in said reserve corps.

The President alone shall be authorized to appoint and commission as reserve officers in the various sections of the Officers' Reserve Corps, in all grades up to and including that of major, such citizens as, upon examination prescribed by the President, shall be found physically, mentally and morally qualified to hold such commissions: Provided, That the proportion of officers in any section of the Officers' Reserve Corps shall not exceed the proportion for the same grade in the corresponding arm, corps, or department of the Regular Army, except that the number commissioned in the lowest authorized grade in any section of the Officers' Reserve Corps shall not be limited.

All persons now carried as duly qualified and registered pursuant to section twenty-three of the Act of Congress approved January twenty-first, nineteen hundred and three, shall, for a period of three years after the passage of this Act, be eligible for appointment in the Officers' Reserve Corps in the section corresponding to the arm, corps, or department for which they have been found qualified, without further examination, except a physical examination, and subject to the limitations as to age and rank herein prescribed: Provided, That any person carried as qualified and registered in the grade of colonel or lieutenant colonel pursuant to the provisions of said Act on the date when this Act becomes effective may be commissioned and recommissioned in the Officers' Reserve Corps with the rank for which he has been found qualified and registered, but when such person thereafter shall become separated from the Officers' Reserve Corps for any reason the vacancy so caused shall not be filled, and such office shall cease and determine.

No person shall, except as hereinafter provided, be appointed or reappointed a second lieutenant in the Officers' Reserve Corps after he shall have reached the age of thirty-two years, a first lieutenant after he shall have reached the age of thirty-six years, a captain after he shall have reached the age of forty years, or a major after he shall have reached the age of forty-five years. When an officer of the Reserve Corps shall reach the age limit fixed for appointment or reappointment in the grade in which commissioned he shall be honorably discharged from the service of the United States, and be entitled to retain his official title and, on occasions of ceremony, to wear the uniform of the highest grade he shall have held in the Offi-

cers' Reserve Corps: Provided, That nothing in the foregoing provisions as to the ages of officers shall apply to the appointment or reappointment of officers of the Quartermaster, Engineer, Ordnance, Signal, Judge Advocate, and Medical sections of said Reserve Corps.

One year after the passage of this Act the Medical Reserve Corps, as now constituted by law, shall cease to exist. Members thereof may be commissioned in the Officers' Reserve Corps, subject to the provisions of this Act, or may be honorably discharged from the service. The Secretary of War may, in time of peace, order first lieutenants of the medical section of the Officers' Reserve Corps, with their consent, to active duty in the service of the United States in such numbers as the public interests may require and the funds appropriated may permit, and may relieve them from such duty when their services are no longer necessary. While on such duty they shall receive the pay and allowances, including pay for periods of sickness and leaves of absence, of officers of corresponding rank and length of active service in the Regular Army.

The commissions of all officers of the Officers' Reserve Corps shall be in force for a period of five years unless sooner terminated in the discretion of the President. Such officers may be recommissioned, either in the same or higher grades, for successive periods of five years, subject to such examinations and qualifications as the President may prescribe and to the age limits prescribed herein: Provided, That officers of the Officers' Reserve Corps shall have rank therein in the various sections of said Reserve Corps according to grades and to length of service in their grades.

Sec. 38. *The Officers' Reserve Corps in war.*—In time of actual or threatened hostilities the President may order officers of the Officers' Reserve Corps, subject to such subsequent physical examinations as he may prescribe, to temporary duty with the Regular Army in grades thereof which can not, for the time being, be filled by promotion, or as officers in volunteer or other organizations that may be authorized by law, or as officers at recruit rendezvous and depots, or on such other duty as the President may prescribe. While such reserve officers are on such service they shall, by virtue of their commissions as reserve officers, exercise command appropriate to their grade and rank in the organizations to which they may be assigned, and shall be entitled to the pay and allowances of the corresponding grades in the Regular Army, with increase of pay for length of active service, as allowed by law for officers of the Regular Army, from the date upon which they shall be required by the terms of their orders to obey the same: Provided, That officers so ordered to active service shall take temporary rank among themselves, and in their grades in the organizations to which assigned, according to the dates of orders placing them on active service; and they may be promoted, in accordance with such rank, to vacancies in volunteer organizations or to temporary vacancies in the Regular Army thereafter occurring in the organizations in which they shall be serving: Provided further, That officers of the Officers' Reserve Corps shall not be entitled to retirement or retired pay, and shall be entitled to pen-

sion only for disability incurred in the line of duty and while in active service.

Any officer who, while holding a commission in the Officers' Reserve Corps, shall be ordered to active service by the Secretary of War shall, from the time he shall be required by the terms of his order to obey the same, be subject to the laws and regulations for the government of the Army of the United States, in so far as they are applicable to officers whose permanent retention in the military service is not contemplated.

Sec. 39. *Instruction of officers of the Officers' Reserve Corps.*—To the extent provided for from time to time by appropriations for this specific purpose, the Secretary of War is authorized to order reserve officers to duty with troops or at field exercises, or for instruction, for periods not to exceed fifteen days in any one calendar year, and while so serving such officers shall receive the pay and allowances of their respective grades in the Regular Army: Provided, That, with the consent of the reserve officers concerned, and within the limit of funds available for the purpose, such periods of duty may be extended for reserve officers as the Secretary of War may direct: Provided further, That in time of actual or threatened hostilities, after all available officers of any section of the Officers' Reserve Corps corresponding to any arm, corps, or department of the Regular Army shall have been ordered into active service, officers of Volunteers may be appointed in such arm, corps, or department as may be authorized by law: Provided further, That nothing herein shall operate to prevent the appointment of any officer of the Regular Army as an officer of Volunteers before all the officers of the Officers' Reserve Corps or any section thereof shall have been ordered into active service: And provided further, That in determining the relative rank and the right to retirement of an officer of the Regular Army, active duty performed by him while serving in the Officers' Reserve Corps shall not be reckoned.

Sec. 40. *The Reserve Officers' Training Corps.*—The President is hereby authorized to establish and maintain in civil educational institutions a Reserve Officers' Training Corps, which shall consist of a senior division organized at universities and colleges requiring four years of collegiate study for a degree, including State universities and those State institutions that are required to provide instruction in military tactics under the provisions of the Act of Congress of July second, eighteen hundred and sixty-two, donating lands for the establishment of colleges where the leading object shall be practical instruction in agriculture and the mechanic arts, including military tactics, and a junior division organized at all other public or private educational institutions, except that units of the senior division may be organized at those essentially military schools which do not confer an academic degree but which, as a result of the annual inspection of such institutions by the War Department, are specially designated by the Secretary of War as qualified for units of the senior division, and each division shall consist of units of the several arms or corps in such number and of such strength as the President may prescribe.

Sec. 41. The President may, upon the application of any State institution described in section forty of this Act, establish and maintain

at such institution one or more units of the Reserve Officers' Training Corps: Provided, That no such unit shall be established or maintained at any such institution until an officer of the Army shall have been detailed as professor of military science and tactics, nor until such institution shall maintain under military instruction at least one hundred physically fit male students.

Sec. 42. The President may, upon the application of any established educational institution in the United States other than a State institution described in section forty of this Act, the authorities of which agree to establish and maintain a two years' elective or compulsory course of military training as a minimum for its physically fit male students, which course when entered upon by any student shall, as regards such student, be a prerequisite for graduation, establish and maintain at such institution one or more units of the Reserve Officers' Training Corps: Provided, That no such unit shall be established or maintained at any such institution until an officer of the Army shall have been detailed as professor of military science and tactics, nor until such institution shall maintain under military instruction at least one hundred physically fit male students.

Sec. 43. The Secretary of War is hereby authorized to prescribe standard courses of theoretical and practical military training for units of the Reserve Officers' Training Corps, and no unit of the senior division shall be organized or maintained at any educational institution the authorities of which fail or neglect to adopt into their curriculum the prescribed courses of military training for the senior division or to devote at least an average of three hours per week per academic year to such military training; and no unit of the junior division shall be organized or maintained at any educational institution the authorities of which fail or neglect to adopt into their curriculum the prescribed courses of military training for the junior division, or to devote at least an average of three hours per week per academic year to such military training.

Sec. 44. Eligibility to membership in the Reserve Officers' Training Corps shall be limited to students of institutions in which units of such corps may be established who are citizens of the United States, who are not less than fourteen years of age, and whose bodily condition indicates that they are physically fit to perform military duty, or will be so upon arrival at military age.

Sec. 45. The President is hereby authorized to detail such numbers of officers of the Army, either active or retired, not above the grade of colonel, as may be necessary, for duty as professors and assistant professors of military science and tactics at institutions where one or more units of the Reserve Officers' Training Corps are maintained; but the total number of active officers so detailed at educational institutions shall not exceed three hundred, and no active officer shall be so detailed who has not had five years' commissioned service in the Army. In time of peace retired officers shall not be detailed under the provisions of this section without their consent. Retired officers below the grade of lieutenant colonel so detailed shall receive the full pay and allowances of their grade, and retired officers above the grade of major so detailed shall receive the same pay and allow-

ances as a retired major would receive under a like detail. No detail of officers on the active list of the Regular Army under the provisions of this section shall extend for more than four years.

Sec. 46. The President is hereby authorized to detail for duty at institutions where one or more units of the Reserve Officers' Training Corps are maintained such number of enlisted men, either active or retired or of the Regular Army Reserve, as he may deem necessary, but the number of active noncommissioned officers so detailed shall not exceed five hundred, and all active noncommissioned officers so detailed shall be additional in their respective grades to those otherwise authorized for the Army. Retired enlisted men or members of the Regular Army Reserve shall not be detailed under the provisions of this section without their consent. While so detailed they shall receive active pay and allowances.

Sec. 47. The Secretary of War, under such regulations as he may prescribe, is hereby authorized to issue to institutions at which one or more units of the Reserve Officers' Training Corps are maintained such public animals, arms, uniforms, equipment, and means of transportation as he may deem necessary, and to forage at the expense of the United States public animals so issued. He shall require from each institution to which property of the United States is issued a bond in the value of the property issued for the care and safe-keeping thereof, and for its return when required.

Sec. 48. The Secretary of War is hereby authorized to maintain camps for the further practical instruction of the members of the Reserve Officers' Training Corps, no such camps to be maintained for a period longer than six weeks in any one year, except in time of actual or threatened hostilities; to transport members of such corps to and from such camps at the expense of the United States so far as appropriations will permit; to subsist them at the expense of the United States while traveling to and from such camps and while remaining therein so far as appropriations will permit; to use the Regular Army, such other military forces as Congress from time to time authorizes, and such Government property as he may deem necessary for the military training of the members of such corps while in attendance at such camps; to prescribe regulations for the government of such corps; and to authorize, in his discretion, the formation of company units thereof into battalion and regimental units.

Sec. 49. The President alone, under such regulations as he may prescribe, is hereby authorized to appoint in the Officers' Reserve Corps any graduate of the senior division of the Reserve Officers' Training Corps who shall have satisfactorily completed the further training provided for in section fifty of this Act, or any graduate of the junior division who shall have satisfactorily completed the courses of military training prescribed for the senior division and the further training provided for in section fifty of this Act, and shall have participated in such practical instruction subsequent to graduation as the Secretary of War shall prescribe, who shall have arrived at the age of twenty-one years and who shall agree, under oath in writing, to serve the United States in the capacity of a reserve officer of the Army during a period of at least ten years from the date of his appointment as such

reserve officer, unless sooner discharged by proper authority; but the total number of reserve officers so appointed shall not exceed fifty thousand: Provided, That any graduate qualified under the provisions of this section undergoing a postgraduate course at any institution shall not be eligible for appointment as a reserve officer while undergoing such postgraduate course, but his ultimate eligibility upon completion of such postgraduate course for such appointment shall not be affected because of his having undergone such postgraduate course.

Sec. 50. When any member of the senior division of the Reserve Officers' Training Corps has completed two academic years of service in that division, and has been selected for further training by the president of the institution and by its professor of military science and tactics, and has agreed in writing to continue in the Reserve Officers' Training Corps for the remainder of his course in the institution, devoting five hours per week to the military training prescribed by the Secretary of War, and has agreed in writing to pursue the courses in camp training prescribed by the Secretary of War, he may be furnished, at the expense of the United States, with commutation of subsistence at such rate, not exceeding the cost of the garrison ration prescribed for the Army, as may be fixed by the Secretary of War, during the remainder of his service in the Reserve Officers' Training Corps.

Sec. 51. Any physically fit male citizen of the United States, between the ages of twenty-one and twenty-seven years, who shall have graduated prior to the date of this Act from any educational institution at which an officer of the Army was detailed as professor of military science and tactics, and who, while a student at such institution, completed courses of military training under the direction of such professor of military science and tactics substantially equivalent to those prescribed pursuant to this Act for the senior division, shall, after satisfactorily completing such additional practical military training as the Secretary of War shall prescribe, be eligible for appointment to the Officers' Reserve Corps and as a temporary additional second lieutenant in accordance with the terms of this Act.

Sec. 52. The President alone is hereby authorized to appoint and commission as a temporary second lieutenant of the Regular Army in time of peace for purposes of instruction, for a period not exceeding six months, with the allowances now provided by law for that grade, but with pay at the rate of \$100 per month, any reserve officer appointed pursuant to sections forty-nine and fifty-one of this Act and to attach him to a unit of the Regular Army for duty and training during the period covered by his appointment as such temporary second lieutenant, and upon the expiration of such service with the Regular Army such officer shall revert to his status as a reserve officer.

Sec. 53. No reserve officer or temporary second lieutenant appointed pursuant to this Act shall be entitled to retirement or to retired pay and shall be eligible for pension only for disability incurred in line of duty in active service or while serving with the Regular Army pursuant to the provisions of this Act: Provided, That in time of war the President may order reserve officers appointed under the provisions of this Act to active duty with any of the military forces of the United

States in any grades not below that of second lieutenant, and while on such active duty they shall be subject to the Rules and Articles of War: And provided further, That the Adjutant General of the Army shall, under the direction and supervision of the Secretary of War, obtain, compile, and keep continually up to date all obtainable information as to the names, ages, addresses, occupations, and qualifications for appointment as commissioned officers of the Army, in time of war or other emergency, of men of suitable ages who, by reason of having received military training in civilian educational institutions or elsewhere, may be regarded as qualified and available for appointment as such commissioned officers.

Sec. 54. *Training camps.*—The Secretary of War is hereby authorized to maintain, upon military reservations or elsewhere, camps for the military instruction and training of such citizens as may be selected for such instruction and training, upon their application and under such terms of enlistment and regulations as may be prescribed by the Secretary of War; to use, for the purpose of maintaining said camps and imparting military instruction and training thereat, such arms, ammunition, accouterments, equipments, tentage, field equipage, and transportation belonging to the United States as he may deem necessary; to furnish, at the expense of the United States, uniforms, subsistence, transportation by the most usual and direct route within such limits as to territory as the Secretary of War may prescribe, and medical supplies to persons receiving instruction at said camps during the period of their attendance thereat, to authorize such expenditures, from proper Army appropriations, as he may deem necessary for water, fuel, light, temporary structures, not including quarters for officers nor barracks for men, screening, and damages resulting from field exercises, and other expenses incidental to the maintenance of said camps, and the theoretical winter instruction in connection therewith; and to sell to persons receiving instruction at said camps, for cash and at cost price plus ten per centum, quartermaster and ordnance property, the amount of such property sold to any one person to be limited to that which is required for his proper equipment. All moneys arising from such sales shall remain available throughout the fiscal year following that in which the sales are made, for the purpose of that appropriation from which the property sold was authorized to be supplied at the time of the sale. The Secretary of War is authorized further to prescribe the courses of theoretical and practical instruction to be pursued by persons attending the camps authorized by this section; to fix the periods during which such camps shall be maintained; to prescribe rules and regulations for the government thereof; and to employ thereat officers and enlisted men of the Regular Army in such numbers and upon such duties as he may designate.

Sec. 55. *The Enlisted Reserve Corps.*—For the purpose of securing an additional reserve of enlisted men for military service with the Engineer, Signal, and Quartermaster Corps and the Ordnance and Medical Departments of the Regular Army, an Enlisted Reserve Corps, to consist of such number of enlisted men of such grade or grades as may be designated by the President from time to time, is hereby au-

thorized, such authorization to be effective on and after the first day of July, nineteen hundred and sixteen.

There may be enlisted in the grade or grades hereinbefore specified, for a period of four years, under such rules as may be prescribed by the President, citizens of the United States, or persons who have declared their intentions to become citizens of the United States, subject to such physical, educational, and practical examination as may be prescribed in said rules. For men enlisting in said grade or grades certificates of enlistment in the Enlisted Reserve Corps shall be issued by The Adjutant General of the Army, but no such man shall be enlisted in said corps unless he shall be found physically, mentally, and morally qualified to hold such certificate and unless he shall be between the ages of eighteen and forty-five years. The certificates so given shall confer upon the holders when called into active service or for purposes of instruction and training, and during the period of such active service, instruction, or training, all the authority, rights, and privileges of like grades of the Regular Army. Enlisted men of the Enlisted Reserve Corps shall take precedence in said corps according to the dates of their certificates of enlistment therein and when called into active service or when called out for purposes of instruction or training shall take precedence next below all other enlisted men of like grades in the Regular Army. And the Secretary of War is hereby authorized to issue to members of the Enlisted Reserve Corps and to persons who have participated in at least one encampment for the military instruction of citizens, conducted under the auspices of the War Department, distinctive rosettes or knots designed for wear with civilian clothing, and whenever a rosette or knot issued under the provisions of this section shall have been lost, destroyed, or rendered unfit for use without fault or neglect upon the part of the person to whom it is issued, the Secretary of War shall cause a new rosette or knot to be issued to such person without charge therefor. Any person who is not an enlisted man of the Enlisted Reserve Corps and shall not have participated in at least one encampment for the military instruction of citizens, conducted under the auspices of the War Department, and who shall wear such rosette or knot shall be guilty of misdemeanor punishable by a fine of not exceeding \$300, or imprisonment not exceeding six months, or both.

The President is authorized to assign members of the Enlisted Reserve Corps as reserves to particular organizations of the Regular Army, or to organize the Enlisted Reserve Corps, or any part thereof, into units or detachments of any arm, corps, or department in such manner as he may prescribe, and to assign to such units and detachments officers of the Regular Army or of the Officers' Reserve Corps, herein provided for.

To the extent provided from time to time by appropriations the Secretary of War may order enlisted men of the Enlisted Reserve Corps to active service for purposes of instruction or training for periods not to exceed fifteen days in any one calendar year: Provided, That, with the consent of such enlisted men and within the limits of funds available for such purposes, such periods of active service

may be extended for such number of enlisted men as may be deemed necessary.

Enlisted men of the Enlisted Reserve Corps shall receive the pay and allowances of their respective grades, but only when ordered into active service, including the time required for actual travel from their homes to the places to which ordered and return to their homes: Provided, That said enlisted men shall not be entitled to retirement or retirement pay, nor shall they be entitled to pensions except for physical disability incurred in line of duty while in active service or while traveling under orders of competent authority to or from designated places of duty.

The uniform to be worn by enlisted men of the Enlisted Reserve Corps, except corps insignia, shall be the same as prescribed for enlisted men of the Regular Army Reserve, and that in lieu of any money allowance for clothing there shall be issued to each enlisted man of the Enlisted Reserve Corps in time of peace such articles of clothing and equipment as the President may direct: Provided, That any clothing or other equipment issued to any enlisted man of the said corps shall remain the property of the United States, and in case of loss or destruction of any article, the article so lost or destroyed shall be replaced by issue to the enlisted man and the value thereof deducted from any pay due or to become due him, unless it shall be made to appear that such loss or destruction was not due to neglect or other fault on his part: Provided further, That any clothing or other equipment issued to enlisted men of the Enlisted Reserve Corps which shall have become unserviceable through ordinary wear and tear in the service of the United States shall be received back by the United States and serviceable like articles issued in lieu thereof: Provided further, That when enlisted men of the Enlisted Reserve Corps shall be discharged or otherwise separated from the service, all arms, equipage, clothing, and other property issued to them shall be accounted for under such regulations as may be prescribed by the Secretary of War.

Any enlisted man of the Enlisted Reserve Corps ordered to active service or for purposes of instruction or training shall, from the time he is required by the terms of the order to obey the same, be subject to the laws and regulations for the government of the Army of the United States.

The Secretary of War is hereby authorized to discharge any enlisted member of the Enlisted Reserve Corps when his services shall be no longer required, or when he shall have by misconduct unfitted himself for further service in the said corps: Provided, That any enlisted man of said corps who shall be ordered upon active duty as herein provided and who shall willfully fail to comply with the terms of the order so given him shall, in addition to any other penalty to which he may be subject, forfeit his certificate of enlistment.

In time of actual or threatened hostilities the President may order the Enlisted Reserve Corps, in such numbers and at such times as may be considered necessary, to active service with the Regular Army, and while on such service members of said corps shall exercise command appropriate to their several grades and rank in the organizations to which they shall be assigned and shall be entitled to the pay and allow-

ances of the corresponding grades in the Regular Army, with increase of pay for length of service as now allowed by law for the Regular Army: Provided, That upon a call by the President for a volunteer force the members of the Enlisted Reserve Corps may be mustered into the service of the United States as volunteers for duty with the Army in the grades held by them in the said corps, and shall be entitled to the pay and allowances of the corresponding grades in the Regular Army, with increase of pay for length of service, as now provided by law for the Regular Army: And provided further, That enlisted men of the Enlisted Reserve Corps shall not acquire by virtue of issuance of certificates of enlistment to them a vested right to be mustered into the volunteer service of the United States.

Sec. 56. *Military equipment and instructors at other schools and colleges.*—Such arms, tentage, and equipment as the Secretary of War shall deem necessary for proper military training shall be supplied by the Government to schools and colleges, other than those provided for in section forty-seven of this Act, having a course of military training prescribed by the Secretary of War and having not less than one hundred physically fit male students above the age of fourteen years, under such rules and regulations as he may prescribe; and the Secretary of War is hereby authorized to detail such commissioned and noncommissioned officers of the Army to said schools and colleges, other than those provided for in section forty-five and forty-six of this Act, detailing not less than one such officer or noncommissioned officer to each five hundred students under military instruction.

Sec. 57. *Composition of the militia.*—The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia.

Sec. 58. *Composition of the National Guard.*—The National Guard shall consist of the regularly enlisted militia between the ages of eighteen and forty-five years organized, armed, and equipped as hereinafter provided, and of commissioned officers between the ages of twenty-one and sixty-four years.

Sec. 59. *Exemptions from militia duty.*—The Vice President of the United States; the officers, judicial and executive, of the Government of the United States and of the several States and Territories; persons in the military or naval service of the United States; custom-house clerks; persons employed by the United States in the transmission of the mail; artificers and workmen employed in the armories, arsenals, and navy yards of the United States; pilots; mariners actually employed in the sea service of any citizen or merchant within the United States, shall be exempt from militia duty without regard to age, and all persons who because of religious belief shall claim exemption from military service, if the conscientious holding of such belief by such person shall be established under such regulations as the

President shall prescribe, shall be exempted from militia service in a combatant capacity; but no person so exempted shall be exempt from militia service in any capacity that the President shall declare to be noncombatant.

Sec. 60. *Organization of National Guard units.*—Except as otherwise specifically provided herein, the organization of the National Guard, including the composition of all units thereof, shall be the same as that which is or may hereafter be prescribed for the Regular Army, subject in time of peace to such general exceptions as may be authorized by the Secretary of War. And the President may prescribe the particular unit or units, as to branch or arm of service, to be maintained in each State, Territory, or the District of Columbia in order to secure a force which, when combined, shall form complete higher tactical units.

Sec. 61. *Maintenance of other troops by the States.*—No State shall maintain troops in time of peace other than as authorized in accordance with the organization prescribed under this Act: Provided, That nothing contained in this Act shall be construed as limiting the rights of the States and Territories in the use of the National Guard within their respective borders in time of peace. Provided further, That nothing contained in this Act shall prevent the organization and maintenance of State police or constabulary.

Sec. 62. *Number of the National Guard.*—The number of enlisted men of the National Guard to be organized under this Act within one year from its passage shall be for each State in the proportion of two hundred such men for each Senator and Representative in Congress from such State, and a number to be determined by the President for each Territory and the District of Columbia, and shall be increased each year thereafter in the proportion of not less than fifty per centum until a total peace strength of not less than eight hundred enlisted men for each Senator and Representative in Congress shall have been reached: Provided, That in States which have but one Representative in Congress such increase shall be at the discretion of the President: Provided further, That this shall not be construed to prevent any State, Territory, or the District of Columbia from organizing the full number of troops required under this section in less time than is specified in this section, or from maintaining existing organizations if they shall conform to such rules and regulations regarding organization, strength and armament as the President may prescribe: And provided further, That nothing in this Act shall be construed to prevent any State with but one Representative in Congress from organizing one or more regiments of troops, with such auxiliary troops as the President may prescribe; such organizations and members of such organizations to receive all the benefits accruing under this Act under the conditions set forth herein: Provided further, That the word Territory as used in this Act and in all laws relating to the land militia and National Guard shall include and apply to Hawaii, Alaska, Porto Rico, and the Canal Zone, and the militia of the Canal Zone shall be organized under such rules and regulations, not in conflict with the provisions of this Act, as the President may prescribe.

Sec. 63. Any corps of Artillery, Cavalry, or Infantry existing in any of the States on the passage of the Act of May eighth, seventeen hundred and ninety-two, which by the laws, customs, or usages of said States has been in continuous existence since the passage of said Act, under its provisions and under the provisions of section two hundred and thirty-two and sections sixteen hundred and twenty-five to sixteen hundred and sixty, both inclusive, of title sixteen of the Revised Statutes of eighteen hundred and seventy-three, and the Act of January twenty-first, nineteen hundred and three, relating to the militia, shall be allowed to retain its ancient privileges, subject, nevertheless, to all duties required by law of militia: Provided, That said organizations may be a part of the National Guard and entitled to all the privileges of this Act, and shall conform in all respects to the organization, discipline, and training of the National Guard in time of war: Provided further, That for purposes of training and when on active duty in the service of the United States they may be assigned to higher units, as the President may direct, and shall be subject to the orders of officers under whom they shall be serving.

Sec. 64. *Assignment of National Guard to brigades and divisions.*—For the purpose of maintaining appropriate organization and to assist in instruction and training, the President may assign the National Guard of the several States and Territories and the District of Columbia to divisions, brigades, and other tactical units, and may detail officers either from the National Guard or the Regular Army to command such units: Provided, There where complete units are organized within a State, Territory, or the District of Columbia the commanding officers thereof shall not be displaced under the provisions of this section.

Sec. 65. *Chiefs of staff of National Guard divisions.*—The President may detail one officer of the Regular Army as chief of staff and one officer of the Regular Army or the National Guard as assistant to the chief of staff of any division of the National Guard in the service of the United States as a National Guard organization: Provided, That in order to insure the prompt mobilization of the National Guard in time of war or other emergency, the President may, in time of peace, detail an officer of the Regular Army to perform the duties of chief of staff for each fully organized tactical division of the National Guard.

Sec. 66. *Adjutants general of States, and so forth.*—The adjutants general of the States, Territories, and the District of Columbia and the officers of the National Guard shall make such returns and reports to the Secretary of War, or to such officers as he may designate, at such times and in such form as the Secretary of War may from time to time prescribe: Provided, That the adjutants general of the Territories and of the District of Columbia shall be appointed by the President with such rank and qualifications as he may prescribe, and each adjutant general for a Territory shall be a citizen of the Territory for which he is appointed.

Sec. 67. *Appropriation, apportionment, and disbursement of funds for the National Guard.*—A sum of money shall hereafter be appropriated annually, to be paid out of any money in the Treasury not

otherwise appropriated, for the support of the National Guard, including the expense of providing arms; ordnance stores, quartermaster stores, and camp equipage, and all other military supplies for issue to the National Guard, and such other expenses pertaining to said guard as are now or may hereafter be authorized by law.

The appropriation provided for in this section shall be apportioned among the several States and Territories under just and equitable procedure to be prescribed by the Secretary of War and in direct ratio to the number of enlisted men in active service in the National Guard existing in such States and Territories at the date of apportionment of said appropriation, and to the District of Columbia, under such regulations as the President may prescribe: Provided, That the sum so apportioned among the several States, Territories, and the District of Columbia, shall be available under such rules as may be prescribed by the Secretary of War for the actual and necessary expenses incurred by officers and enlisted men of the Regular Army when traveling on duty in connection with the National Guard; for the transportation of supplies furnished to the National Guard for the permanent equipment thereof; for office rent and necessary office expenses of officers of the Regular Army on duty with the National Guard; for the expenses of the Militia Bureau, including clerical services, now authorized for the Division of Militia Affairs; for expenses of enlisted men of the Regular Army on duty with the National Guard, including quarters, fuel, light, medicines, and medical attendance; and such expenses shall constitute a charge against the whole sum annually appropriated for the support of the National Guard, and shall be paid therefrom and not from the allotment duly apportioned to any particular State, Territory, or the District of Columbia; for the promotion of rifle practice, including the acquisition, construction, maintenance, and equipment of shooting galleries and suitable target ranges; for the hiring of horses and draft animals for the use of mounted troops, batteries, and wagons; for forage for the same; and for such other incidental expenses in connection with lawfully authorized encampments, maneuvers, and field instruction as the Secretary of War may deem necessary, and for such other expenses pertaining to the National Guard as are now or may hereafter be authorized by law.

The governor of each State and Territory and the commanding general of the National Guard of the District of Columbia shall appoint, designate, or detail, subject to the approval of the Secretary of War, an officer of the National Guard of the State, Territory, or District of Columbia who shall be regarded as property and disbursing officer for the United States. He shall receipt and account for all funds and property belonging to the United States in possession of the National Guard of his State, Territory, or District, and shall make such returns and reports concerning the same as may be required by the Secretary of War. The Secretary of War is authorized, on the requisition of the governor of a State or Territory or the commanding general of the National Guard of the District of Columbia, to pay to the property and disbursing officer thereof so much of its allotment out of the annual appropriation for the support of

the National Guard as shall, in the judgment of the Secretary of War, be necessary for the purposes enumerated therein. He shall render, through the War Department, such accounts of Federal funds intrusted to him for disbursement as may be required by the Treasury Department. Before entering upon the performance of his duties as property and disbursing officer he shall be required to give good and sufficient bond to the United States, the amount thereof to be determined by the Secretary of War, for the faithful performance of his duties and for the safe-keeping and proper disposition of the Federal property and funds intrusted to his care. He shall, after having qualified as property and disbursing officer, receive pay for his services at a rate to be fixed by the Secretary of War, and such compensation shall be a charge against the whole sum annually appropriated for the support of the National Guard: Provided, That when traveling in the performance of his official duties under orders issued by the proper authorities he shall be reimbursed for his actual necessary traveling expenses, the sum to be made a charge against the allotment of the State, Territory, or District of Columbia: Provided further, That the Secretary of War shall cause an inspection of the accounts and records of the property and disbursing officer to be made by an inspector general of the Army at least once each year: And provided further, That the Secretary of War is empowered to make all rules and regulations necessary to carry into effect the provisions of this section.

Sec. 68. *Location of units.*—The States and Territories shall have the right to determine and fix the location of the units and headquarters of the National Guard within their respective borders: Provided, That no organization of the National Guard, members of which shall be entitled to and shall have received compensation under the provisions of this Act, shall be disbanded without the consent of the President, nor, without such consent, shall the commissioned or enlisted strength of any such organization be reduced below the minimum that shall be prescribed therefor by the President.

Sec. 69. *Enlistments in the National Guard.*—Hereafter the period of enlistment in the National Guard shall be for six years, the first three years of which shall be in an active organization and the remaining three years in the National Guard Reserve, hereinafter provided for, and the qualifications for enlistment shall be the same as those prescribed for admission to the Regular Army: Provided, That in the National Guard the privilege of continuing in active service during the whole of an enlistment period and of reenlisting in said service shall not be denied by reason of anything contained in this Act.

Sec. 70. *Federal enlistment contract.*—Enlisted men in the National Guard of the several States, Territories, and the District of Columbia now serving under enlistment contracts which contain an obligation to defend the Constitution of the United States and to obey the orders of the President of the United States shall be recognized as members of the National Guard under the provisions of this Act for the unexpired portion of their present enlistment contracts. When any such enlistment contract does not contain such obligation,

the enlisted man shall not be recognized as a member of the National Guard until he shall have signed an enlistment contract and taken and subscribed to the following oath of enlistment, upon signing which credit shall be given for the period already served under the old enlistment contract: "I do hereby acknowledge to have voluntarily enlisted this — day of —, 19—, as a soldier in the National Guard of the United States and of the State of —, for the period of three years in service and three years in the reserve, under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the State of —, and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and of the governor of the State of —, and of the officers appointed over me according to law and the rules and articles of war."

Sec. 71. Hereafter all men enlisting for service in the National Guard shall sign an enlistment contract and take and subscribe to the oath prescribed in the preceding section of this Act.

Sec. 72. *Discharge of enlisted men from the National Guard.*—An enlisted man discharged from service in the National Guard shall receive a discharge in writing in such form and with such classification as is or shall be prescribed for the Regular Army, and in time of peace discharges may be given prior to the expiration of terms of enlistment under such regulations as the President may prescribe.

Sec. 73. *Federal oath for National Guard officers.*—Commissioned officers of the National Guard of the several States, Territories, and the District of Columbia now serving under commissions regularly issued shall continue in office, as officers of the National Guard, without the issuance of new commissions: Provided, That said officers have taken, or shall take and subscribe to the following oath of office: "I, —, do solemnly swear that I will support and defend the Constitution of the United States and the constitution of the State of —, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey the orders of the President of the United States and of the governor of the State of —; that I make this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of — in the National Guard of the United States and of the State of — upon which I am about to enter, so help me God."

Sec. 74. *Qualifications for National Guard officers.*—Persons hereafter commissioned as officers of the National Guard shall not be recognized as such under any of the provisions of this Act unless they shall have been selected from the following classes and shall have taken and subscribed to the oath of office prescribed in the preceding section of this Act: Officers or enlisted men of the National Guard; officers on the reserve or unassigned list of the National Guard; officers, active or retired, and former officers of the United States Army, Navy, and Marine Corps; graduates of the United States Military and Naval Academies and graduates of schools, colleges, and universities where military science is taught under the supervi-

sion of an officer of the Regular Army, and, for the technical branches and staff corps or departments, such other civilians as may be especially qualified for duty therein.

Sec. 75. The provisions of this Act shall not apply to any person hereafter appointed an officer of the National Guard unless he first shall have successfully passed such tests as to his physical, moral, and professional fitness as the President shall prescribe. The examination to determine such qualifications for commission shall be conducted by a board of three commissioned officers appointed by the Secretary of War from the Regular Army or the National Guard, or both.

Sec. 76. *Filling of vacancies when drafted into federal service.*—All vacancies occurring in any grade of commissioned officers in any organization in the military service of the United States and composed of persons drafted from the National Guard under the provisions of this Act shall be filled by the President, as far as practicable, by the appointment of persons similarly taken from said guard, and in the manner prescribed by law for filling similar vacancies occurring in the volunteer forces.

Sec. 77. *Elimination and disposition of officers.*—At any time the moral character, capacity, and general fitness for the service of any National Guard officer may be determined by an efficiency board of three commissioned officers, senior in rank to the officer whose fitness for service shall be under investigation, and if the findings of such board be unfavorable to such officer and be approved by the official authorized to appoint such an officer, he shall be discharged. Commissions of officers of the National Guard may be vacated upon resignation, absence without leave for three months, upon the recommendation of an efficiency board, or pursuant to sentence of a court-martial. Officers of said guard rendered surplus by the disbandment of their organizations shall be placed in the National Guard Reserve. Officers may, upon their own application, be placed in the said reserve.

Sec. 78. *The National Guard Reserve.*—Subject to such rules and regulations as the President may prescribe, a National Guard Reserve shall be organized in each State, Territory, and the District of Columbia, and shall consist of such organizations, officers, and enlisted men as the President may prescribe, or members thereof may be assigned as reserves to an active organization of the National Guard: Provided, That members of said reserve, when engaged in field or coast-defense training with the active National Guard, shall receive the same Federal pay and allowances as enlisted men of like grade on the active list of said guard when likewise engaged: Provided further, That, except as otherwise specifically provided in this Act, no commissioned or enlisted reservist shall receive any pay or allowances out of any appropriation made by Congress for National Guard purposes.

Sec. 79. *Reserve battalions for recruit training.*—When members of the National Guard and the enlisted reserve thereof of any State, Territory, or the District of Columbia shall have been brought into the service of the United States in time of war, there shall be immediately organized, either from such enlisted reserve or from the

unorganized militia, in such State, Territory, or District, one reserve battalion for each regiment of Infantry or Cavalry, or each nine batteries of Field Artillery, or each twelve companies of Coast Artillery, brought into the service of the United States, and such reserve battalion shall constitute the fourth battalion of any such regiment or twelve companies of Coast Artillery. Reserve battalions shall consist of four companies of such strength as may be prescribed by the President of the United States. When the members of three or more regiments of the National Guard of any State, Territory, or District shall have been brought into the service of the United States, the reserve battalions of such regiments may be organized into provisional regiments and higher units. If for any reason there shall not be enough voluntary enlistments to keep the reserve battalions at the prescribed strength, a sufficient number of the unorganized militia shall be drafted into the service of the United States to maintain each of such battalions at the proper strength. As vacancies occur from death or other causes in any organization in the service of the United States and composed of men taken from the National Guard, men shall be transferred from the reserve battalions to the organizations in the field so that such organizations may be maintained at war strength. Officers for the reserve battalions provided for herein shall be drafted from the National Guard Reserve or Coast Artillery companies of the National Guard or the Officers' Reserve Corps, such officers to be taken, if practicable, from the States, respectively, in which the battalions shall be organized. Officers and noncommissioned officers returned to their home stations because of their inability to perform active field service may be assigned to reserve battalions for duty, and all soldiers invalided home shall be assigned to and carried on the rolls of reserve battalions until returned to duty or until discharged.

Sec. 80. *Leaves of absence for certain Government employees.*—All officers and employees of the United States and of the District of Columbia who shall be members of the National Guard shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be engaged in field or coast-defense training ordered or authorized under the provisions of this Act.

Sec. 81. *Militia Bureau of the War Department.*—The National Militia Board created by section eleven of the Act of May twenty-seventh, nineteen hundred and eight, amending section twenty of the Act of January twenty-first, nineteen hundred and three, shall, from the date of the approval of this Act, be abolished. The Militia Division now existing in the War Department shall hereafter be known as the Militia Bureau of said department, shall, like other bureaus of said department, be under the immediate supervision of the Secretary of War, and shall not form a part of any other bureau, office, or other organization, but the Chief of the Militia Bureau shall be ex officio a member of the General Staff Corps: Provided, That the President may, in his discretion, assign to duty in the Militia Bureau as assistants to the chief thereof not to exceed one colonel and one lieutenant colonel of the National Guard, for terms of four years, and any such officer while so assigned shall, subject to

such regulations as the President may prescribe, receive out of the whole fund appropriated for the support of the militia the pay and allowances of a Regular Army officer having the same rank and length of service as said National Guard officer, whose prior service in the Organized Militia shall be counted in ascertaining his rights under this proviso.

Sec. 82. *Armament, equipment, and uniform of the National Guard.*—The National Guard of the United States shall, as far as practicable, be uniformed, armed, and equipped with the same type of uniforms, arms, and equipments as are or shall be provided for the Regular Army.

Sec. 83. The Secretary of War is hereby authorized to procure, under such regulations as the President may prescribe, by purchase or manufacture, within the limits of available appropriations made by Congress, and to issue from time to time to the National Guard, upon requisition of the governors of the several States and Territories or the commanding general of the National Guard of the District of Columbia, such number of United States service arms, with all accessories, field-artillery, matériel, engineer, coast artillery, signal, and sanitary matériel, accouterments, field uniforms, clothing, equipment, publications, and military stores of all kinds, including public animals, as are necessary to arm, uniform, and equip for field service the National Guard in the several States, Territories, and the District of Columbia: Provided, That as a condition precedent to the issue of any property as provided for by this Act, the State, Territory, or the District of Columbia desiring such issue shall make adequate provision, to the satisfaction of the Secretary of War, for the protection and care of such property: Provided further, That, whenever it shall be shown to the satisfaction of the Secretary of War that the National Guard of any State, Territory, or the District of Columbia, is properly organized, armed, and equipped for field service, funds allotted to that State, Territory, or District for the support of its National Guard may be used for the purchase, from the War Department, of any article issued by any of the supply departments of the Army.

Sec. 84. Under such regulations as the President may prescribe, whenever a new type of equipment, small arm, or field gun shall have been issued to the National Guard of the several States, Territories, and the District of Columbia, such equipment, small arms, and field guns, including all accessories, shall be furnished without charging the cost or value thereof or any expense connected therewith against the appropriations provided for the support of the National Guard.

Sec. 85. Each State, Territory, and the District of Columbia shall, on the receipt of new property issued to replace obsolete or condemned prior issues, turn in to the War Department or otherwise dispose of, in accordance with the directions of the Secretary of War, all property so replaced or condemned, and shall not receive any money credit therefor.

Sec. 86. Any State, Territory, or the District of Columbia may, with the approval of the Secretary of War, purchase for cash from the War Department for the use of the National Guard, including the officers thereof, any stores, supplies, material of war, and military

publications furnished to the Army, in addition to those issued under the provisions of this Act, at the price at which they shall be listed to the Army, with cost of transportation added. The funds received from such sale shall be credited to the appropriation to which they shall belong, shall not be covered into the Treasury, and shall be available until expended to replace therewith the supplies sold to the States in the manner herein authorized: Provided, That stores, supplies, and matériel of war so purchased by a State, Territory, or the District of Columbia may, in time of actual or threatened war, be requisitioned by the United States for use in the military service thereof, and when so requisitioned by the United States and delivered credit for the ultimate return of such property in kind shall be allowed to such State, Territory, or the District of Columbia.

Sec. 87. *Disposition and replacement of damaged property, and so forth.*—All military property issued to the National Guard as herein provided shall remain the property of the United States. Whenever any such property issued to the National Guard in any State or Territory or the District of Columbia shall have been lost, damaged, or destroyed, or become unserviceable or unsuitable by use in service or from any other cause, it shall be examined by a disinterested surveying officer of the Regular Army or the National Guard, detailed by the Secretary of War, and the report of such surveying officer shall be forwarded to the Secretary of War, or to such officer as he shall designate to receive such reports; and if it shall appear to the Secretary of War from the record of survey that the property was lost, damaged, or destroyed through unavoidable causes, he is hereby authorized to relieve the State or Territory or the District of Columbia from further accountability therefor. If it shall appear that the loss, damage, or destruction of property was due to carelessness or neglect, or that its loss, damage, or destruction could have been avoided by the exercise of reasonable care, the money value of such property shall be charged to the accountable State, Territory, or District of Columbia, to be paid from State, Territory, or District funds, or any funds other than Federal. If the articles so surveyed are found to be unserviceable or unsuitable, the Secretary of War shall direct what disposition, by sale or otherwise, shall be made of them; and if sold, the proceeds of such sale, as well as stoppages against officers and enlisted men, and the net proceeds of collections made from any person or from any State, Territory, or District to reimburse the Government for the loss, damage, or destruction of any property, shall be deposited in the Treasury of the United States as a credit to said State, Territory, or the District of Columbia, accountable for said property, and as a part of and in addition to that portion of its allotment set aside for the purchase of similar supplies, stores, or material of war: Provided further, That if any State, Territory, or the District of Columbia shall neglect or refuse to pay, or to cause to be paid, the money equivalent of any loss, damage, or destruction of property charged against such State, Territory, or the District of Columbia by the Secretary of War after survey by a disinterested officer appointed as hereinbefore provided, the Secretary of War is hereby authorized to debar such State, Territory, or the District of Columbia from further participation in any

and all appropriations for the National Guard until such payment shall have been made.

Sec. 88. The net proceeds of the sale of condemned stores issued to the National Guard and not charged to State allotments shall be covered into the Treasury of the United States, as shall also stoppages against officers and enlisted men, and the net proceeds of collections made from any person to reimburse the Government for the loss, damage, or destruction of said property not charged against the State allotment issued for the use of the National Guard.

Sec. 89. *Horses for Cavalry and Field Artillery of National Guard.*—Funds allotted by the Secretary of War for the support of the National Guard shall be available for the purchase, under such regulations as the Secretary of War may prescribe, of horses conforming to the Regular Army standards for the use of Field Artillery and Cavalry of the National Guard, said horses to remain the property of the United States and to be used solely for military purposes.

Horses so purchased may be issued not to exceed thirty-two to any one battery or troop, under such regulations as the Secretary of War may prescribe; and the Secretary of War is further authorized to issue, in lieu of purchase, for the use of such organizations, condemned Army horses which are no longer fit for service, but which may be suitable for the purposes of instruction, such horses to be sold as now provided by law when said purposes shall have been served.

Sec. 90. Funds allotted by the Secretary of War for the support of the National Guard shall be available for the purchase and issue of forage, bedding, shoeing, and veterinary services, and supplies for the Government horses issued to any battery or troop, and for the compensation of competent help for the care of the material, animals, and equipment thereof, under such regulations as the Secretary of War may prescribe: Provided, That the men to be compensated, not to exceed five for each battery or troop, shall be duly enlisted therein and shall be detailed by the battery or troop commander, under such regulations as the Secretary of War may prescribe, and shall be paid by the United States disbursing officer in each State, Territory, and the District of Columbia.

Sec. 91. *Discipline to conform to that of Regular Army.*—The discipline (which includes training) of the National Guard shall conform to the system which is now or may hereafter be prescribed for the Regular Army, and the training shall be carried out by the several States, Territories, and the District of Columbia so as to conform to the provisions of this Act.

Sec. 92. *Training of the National Guard.*—Each company, troop, battery, and detachment in the National Guard shall assemble for drill and instruction, including indoor target practice, not less than forty-eight times each year, and shall, in addition thereto, participate in encampments, maneuvers, or other exercises, including outdoor target practice, at least fifteen days in training each year, including target practice, unless such company, troop, battery, or detachment shall have been excused from participation in any part thereof by the Secretary of War: Provided, That credit for an assembly for drill or for indoor target practice shall not be given unless the num-

ber of officers and enlisted men present for duty at such assembly shall equal or exceed a minimum to be prescribed by the President, nor unless the period of actual military duty and instruction participated in by each officer and enlisted man at each such assembly at which he shall be credited as having been present shall be of at least one and one-half hours' duration and the character of training such as may be prescribed by the Secretary of War.

Sec. 93. *Inspections of the National Guard.*—The Secretary of War shall cause an inspection to be made at least once each year by inspectors general, and if necessary by other officers, of the Regular Army, detailed by him for that purpose, to determine whether the amount and condition of the property in the hands of the National Guard is satisfactory; whether the National Guard is organized as hereinbefore prescribed; whether the officers and enlisted men possess the physical and other qualifications prescribed; whether the organization and the officers and enlisted men thereof are sufficiently armed, uniformed, equipped, and being trained and instructed for active duty in the field or coast defense, and whether the records are being kept in accordance with the requirements of this Act. The reports of such inspections shall serve as the basis for deciding as to the issue to and retention by the National Guard of the military property provided for by this Act, and for determining what organizations and individuals shall be considered as constituting parts of the National Guard within the meaning of this Act.

Sec. 94. *Encampments and maneuvers.*—Under such regulations as the President may prescribe the Secretary of War is authorized to provide for the participation of the whole or any part of the National Guard in encampments, maneuvers, or other exercises, including outdoor target practice, for field or coast-defense instruction, either independently or in conjunction with any part of the Regular Army, and there may be set aside from the funds appropriated for that purpose and allotted to any State, Territory, or the District of Columbia, such portion of said funds as may be necessary for the payment, subsistence, transportation, and other proper expenses of such portion of the National Guard of such State, Territory, or the District of Columbia as shall participate in such encampments, maneuvers, or other exercises, including outdoor target practice, for field and coast-defense instruction; and the officers and enlisted men of such National Guard while so engaged shall be entitled to the same pay, subsistence, and transportation as officers and enlisted men of corresponding grades of the Regular Army are or hereafter may be entitled by law.

Sec. 95. When any part of the National Guard participates in encampments, maneuvers, or other exercises, including outdoor target practice, for field or coast-defense instruction at a United States military post, or reservation, or elsewhere, if in conjunction with troops of the United States, the command of such military post or reservation and of the officers and troops of the United States on duty there or elsewhere shall remain with the commander of the United States troops without regard to the rank of the commanding or other officer of the National Guard temporarily engaged in the encampments, maneuvers, or other exercises.

Sec. 96. *Use of Regular Army personnel.*—The Secretary of War may detail one or more officers and enlisted men of the Regular Army to attend any encampment, maneuver, or other exercise for field or coast-defense instruction of the National Guard, who shall give such instruction and information to the officers and men assembled for such encampment, maneuver, or other exercise as may be directed by the Secretary of War or requested by the governor or by the commanding officer of the National Guard there on duty.

Sec. 97. Under such regulations as the President may prescribe the Secretary of War may provide camps for the instruction of officers and enlisted men of the National Guard. Such camps shall be conducted by officers of the Regular Army detailed by the Secretary of War for that purpose, and may be located either within or without the State, Territory, or District of Columbia to which the members of the National Guard designated to attend said camps shall belong. Officers and enlisted men attending such camps shall be entitled to pay and transportation, and enlisted men to subsistence in addition, at the same rates as for encampments or maneuvers for field or coast-defense instruction.

Sec. 98. When any portion of the National Guard shall participate in encampments, maneuvers, or other exercises, including outdoor target practice, for field or coast-defense instruction, under the provisions of this Act, it may, after being duly mustered, be paid at any time after such muster for the period from the date of leaving the home rendezvous to date of return thereto as determined in advance, both dates inclusive; and such payment, if otherwise correct, shall pass to the credit of the disbursing officer making the same.

Sec. 99. *National Guard officers and men at service schools, and so forth.*—Under such regulations as the President may prescribe, the Secretary of War may, upon the recommendation of the governor of any State or Territory or the commanding general of the National Guard of the District of Columbia, authorize a limited number of selected officers or enlisted men of the National Guard to attend and pursue a regular course of study at any military service school of the United States, except the United States Military Academy; or to be attached to an organization of the same arm, corps, or department to which such officer or enlisted man shall belong, for routine practical instruction at or near an Army post during a period of field training or other outdoor exercises; and such officer or enlisted man shall receive, out of any National Guard allotment of funds available for the purpose, the same travel allowances and quarters, or commutation of quarters, and the same pay, allowances, and subsistence to which an officer or enlisted man of the Regular Army would be entitled for attending such school, college, or practical course of instruction under orders from proper military authority, while in actual attendance at such school, college, or practical course of instruction: Provided, That in no case shall the pay and allowances authorized by this section exceed those of a captain.

Sec. 100. *Detail of officers of Regular Army to duty with the National Guard.*—The Secretary of War shall detail officers of the active list of the Army to duty with the National Guard in each State,

Territory, or District of Columbia, and officers so detailed may accept commissions in the National Guard, with the permission of the President and terminable in his discretion, without vacating their commissions in the Regular Army or being prejudiced in their relative or lineal standing therein. The Secretary of War may, upon like application, detail one or more enlisted men of the Regular Army with each State, Territory, or District of Columbia for duty in connection with the National Guard. But nothing in this section shall be so construed as to prevent the detail of retired officers as now provided by law.

Sec. 101. *National Guard, when subject to laws governing Regular Army.*—The National Guard when called as such into the service of the United States shall, from the time they are required by the terms of the call to respond thereto, be subject to the laws and regulations governing the Regular Army, so far as such laws and regulations are applicable to officers and enlisted men whose permanent retention in the military service, either on the active list or on the retired list, is not contemplated by existing law.

Sec. 102. *System of courts-martial for National Guard.*—Except in organizations in the service of the United States, court-martial in the National Guard shall be of three kinds, namely, general courts-martial, special courts-martial, and summary courts-martial. They shall be constituted like, and have cognizance of the same subjects, and possess like powers, except as to punishments, as similar courts provided for by the laws and regulations governing the Army of the United States, and the proceedings of courts-martial of the National Guard shall follow the forms and modes of procedure prescribed for said similar courts.

Sec. 103. General courts-martial of the National Guard not in the service of the United States may be convened by orders of the President, or of the governors of the respective States and Territories, or by the commanding general of the National Guard of the District of Columbia, and such courts shall have the power to impose fines not exceeding \$200; to sentence to forfeiture of pay and allowances; to a reprimand; to dismissal or dishonorable discharge from the service; to reduction of noncommissioned officers to the ranks; or any two or more of such punishments may be combined in the sentences imposed by such courts.

Sec. 104. In the National Guard, not in the service of the United States, the commanding officer of each garrison, fort, post, camp, or other place, brigade, regiment, detached battalion, or other detached command, may appoint special courts-martial for his command; but such special courts-martial may in any case be appointed by superior authority when by the latter deemed desirable. Special courts-martial shall have power to try any person subject to military law, except a commissioned officer, for any crime or offense made punishable by the military laws of the United States, and such special courts-martial shall have the same powers of punishment as do general courts-martial, except that fines imposed by such courts shall not exceed \$100.

Sec. 105. In the National Guard, not in the service of the United States, the commanding officer of each garrison, fort, post, or other place, regiment or corps, detached battalion, company, or other detach-

ment of the National Guard may appoint for such place or command a summary court to consist of one officer, who shall have power to administer oaths and to try the enlisted men of such place or command for breaches of discipline and violations of laws governing such organizations; and said court, when satisfied of the guilt of such soldier, may impose fines not exceeding \$25 for any single offense; may sentence noncommissioned officer to reduction to the ranks; may sentence to forfeiture of pay and allowances. The proceedings of such court shall be informal, and the minutes thereof shall be the same as prescribed for summary courts of the Army of the United States.

Sec. 106. All courts-martial of the National Guard, not in the service of the United States, including summary courts, shall have power to sentence to confinement in lieu of fines authorized to be imposed: Provided, That such sentences of confinement shall not exceed one day for each dollar of fine authorized.

Sec. 107. No sentence of dismissal from the service or dishonorable discharge, imposed by a National Guard court-martial, not in the service of the United States, shall be executed until approved by the governor of the State or Territory concerned, or by the commanding general of the National Guard of the District of Columbia.

Sec. 108. In the National Guard, not in the service of the United States, presidents of courts-martial and summary court officers shall have power to issue warrants to arrest accused persons and to bring them before the court for trial whenever such persons shall have disobeyed an order in writing from the convening authority to appear before such court, a copy of the charge or charges having been delivered to the accused with such order, and to issue subpoenas and subpoenas duces tecum and to enforce by attachment attendance of witnesses and the production of books and papers, and to sentence for a refusal to be sworn or to answer as provided in actions before civil courts.

All processes and sentences of said courts shall be executed by such civil officers as may be prescribed by the laws of the several States and Territories, and in any State where no provision shall have been made for such action, and in the Territories and the District of Columbia, such processes and sentences shall be executed by a United States marshal or his duly appointed deputy and it shall be the duty of any United States marshal to execute all such processes and sentences and make return thereof to the officer issuing or imposing the same.

Sec. 109. *Pay for National Guard officers.*—Certain commissioned officers on the active list belonging to organizations of the National Guard of each State, Territory, and the District of Columbia participating in the apportionment of the annual appropriation for the support of the National Guard shall receive compensation for their services, except during periods of service for which they may become lawfully entitled to the same pay as officers of corresponding grades of the Regular Army, as follows, not to include longevity pay: A captain \$500 per year and the same pay shall be paid to every officer of higher rank than that of captain, a first lieutenant \$240 per year, and a second lieutenant \$200 per year. Regulations to be prescribed by the Secretary of War shall determine the amount and character of service that must be rendered by officers to entitle them to the whole or

specific parts of the maximum pay hereinbefore authorized: Provided, That all staff officers, aids-de-camp, and chaplains shall receive not to exceed one-half of the pay of a captain, except that regimental adjutants, and majors and captains in command of machine-gun companies, ambulance companies, field hospital companies, or sanitary troops shall receive the pay hereinbefore authorized for a captain.

Sec. 110. *Pay for National Guard enlisted men.*—Each enlisted man on the active list belonging to an organization of the National Guard of a State, Territory, or the District of Columbia, participating in the apportionment of the annual appropriation for the support of the National Guard, shall receive compensation for his services, except during periods of service for which he may become lawfully entitled to the same pay as an enlisted man of corresponding grade in the Regular Army, at a rate equal to twenty-five per centum of the initial pay now provided by law for enlisted men of corresponding grades of the Regular Army: Provided, That such enlisted man shall receive the compensation herein provided if he shall have attended not less than forty-eight regular drills during any one year, and a proportionate amount for attendance upon a lesser number of such drills, not less than twenty-four; and no such enlisted man shall receive any part of said compensation except as authorized by this proviso and the three provisos next following: Provided further, That the compensation provided herein shall be computed for semiannual periods, beginning the first day of January and the first day of July of each year, in proportion to the number of drills attended; and no compensation shall be paid to any enlisted man for the first semiannual period of any year unless he shall have attended during said period at least twenty-four drills, but any lesser number of drills attended during said period shall be reckoned with the drills attended during the second semiannual period in computing the compensation, if any, due him for that year: Provided further, That when any man enters into an enlistment other than an immediate reenlistment he shall be entitled to proportional compensation for that year if during the remainder of the year he shall attend a number of drills whose ratio to twenty-four is not less than the ratio of the part of the year so served to the whole year; and when any man's enlistment shall expire the compensation, if any, to which he may be entitled shall be determined in like manner: Provided further, That periods of any actual military duty equivalent to the drills herein prescribed (except those periods of service for which members of the National Guard may become lawfully entitled to the same pay as officers and enlisted men of the corresponding grades in the Regular Army) may be accepted as service in lieu of such drills when so provided by the Secretary of War.

All amounts appropriated for the purpose of this and the last preceding section shall be disbursed and accounted for by the officers and agents of the Quartermaster Corps of the Army, and all disbursements under the foregoing provisions of this section shall be made as soon as practicable after the thirty-first day of December and the thirtieth day of June of each year upon pay rolls prepared and authenticated in the manner to be prescribed by the Secretary of War: Provided, That stoppages may be made against the compensation payable to any officer or

enlisted man hereunder to cover the cost of public property lost or destroyed by and chargeable to such officer or enlisted man.

Except as otherwise specifically provided herein, no money appropriated under the provisions of this or the last preceding section shall be paid to any person not on the active list, nor to any person over sixty-four years of age, nor to any person who shall fail to qualify as to fitness for military service under such regulations as the Secretary of War shall prescribe, nor to any State, Territory, or District, or officer or enlisted man in the National Guard thereof, unless and until such State, Territory, or District provides by law that staff officers, including officers of the Pay, Inspection, Subsistence, and Medical Departments, hereafter appointed shall have had previous military experience and shall hold their positions until they shall have reached the age of sixty-four years, unless retired prior to that time by reason of resignation, disability, or for cause to be determined by a court-martial legally convened for that purpose, and that vacancies among said officers shall be filled by appointment from the officers of the militia of such State, Territory or District: Provided further, That the preceding proviso shall not apply to any State, Territory, or District until sixty days next after the adjournment of the next session of its legislature held after the approval of this Act.

Sec. 111. *National Guard when drafted into Federal service.*—When Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, under such regulations, including such physical examination, as he may prescribe, draft into the military service of the United States, to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and of the National Guard Reserve. All persons so drafted shall, from the date of their draft, stand discharged from the militia, and shall from said date be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army, and shall be embodied in organizations corresponding as far as practicable to those of the Regular Army or shall be otherwise assigned as the President may direct. The commissioned officers of said organizations shall be appointed from among the members thereof, officers with rank not above that of colonel to be appointed by the President alone, and all other officers to be appointed by the President by and with the advice and consent of the Senate. Officers and enlisted men in the service of the United States under the terms of this section shall have the same pay and allowances as officers and enlisted men of the Regular Army of the same grades and the same prior service.

Sec. 112. *Rights to pensions.*—When any officer or enlisted man of the National Guard drafted into the service of the United States in time of war is disabled by reason of wounds or disability received or incurred while in the active service of the United States in time of war, he shall be entitled to all the benefits of the pension laws existing at the time of his service, and in case such officer or enlisted man dies in the active service of the United States in time of war or in returning to his place of residence after being mustered out of such service, or

at any other time in consequence of wounds or disabilities received in such active service, his widow and children, if any, shall be entitled to all the benefits of such pension laws.

Sec. 113. *Encouragement of rifle practice.*—The Secretary of War shall annually submit to Congress recommendations and estimates for the establishment and maintenance of indoor and outdoor rifle ranges, under such a comprehensive plan as will ultimately result in providing adequate facilities for rifle practice in all sections of the country. And that all ranges so established and all ranges which may have already been constructed, in whole or in part, with funds provided by Congress shall be open for use by those in any branch of the military or naval service of the United States and by all able-bodied males capable of bearing arms, under reasonable regulations to be prescribed by the controlling authorities and approved by the Secretary of War. That the President may detail capable officers and noncommissioned officers of the Regular Army and National Guard to duty at such ranges as instructors for the purpose of training the citizenry in the use of the military arm. Where rifle ranges shall have been so established and instructors assigned to duty thereat, the Secretary of War shall be authorized to provide for the issue of a reasonable number of standard military rifles and such quantities of ammunition as may be available for use in conducting such rifle practice.

Sec. 114. *Temporary vacancies in Regular Army due to details to the National Guard.*—In time of war the temporary vacancies created in any grade not above that of colonel among the commissioned personnel of any arm, staff corps, or department of the Regular Army, through appointments of officers thereof to higher rank in organizations composed of members taken from the National Guard, shall be filled by temporary promotions according to seniority in rank from officers holding commissions in the next lower grade in said arm, staff corps, or department, and all vacancies created in any grade by such temporary promotions shall be in like manner filled from, and thus create temporary vacancies in, the next lower grade, and the vacancies that shall remain thereafter in said arm, staff corps, or department and that can not be filled by temporary promotions, as prescribed in this section, may be filled by the temporary appointment of officers of such number and grade or grades as shall maintain said arm, corps, or department at the full commissioned strength authorized by law: Provided, That in the staff corps and departments subject to the provisions of sections twenty-six and twenty-seven of the Act of February second, nineteen hundred and one, and Acts amendatory thereof, temporary vacancies that can not be filled by temporary promotions as hereinbefore prescribed shall be filled by temporary details in the manner prescribed in said sections twenty-six and twenty-seven, and Acts amendatory thereof, and the resulting temporary vacancies in the branches of the Army from which the details shall be so made shall be filled as hereinbefore in this section prescribed: Provided further, That officers temporarily promoted or appointed under the terms of this section shall be promoted or appointed by the President, by and with the advice and consent of the Senate, for terms that shall not extend beyond the war or the passing of the emergency for which additional

forces were brought into the military service of the United States, and at the termination of the war or the passing of the emergency said officers shall be discharged from the positions held by them under their temporary commissions or appointments, and officers detailed as herein authorized shall be relieved from their temporary details: And provided further, That officers temporarily promoted under the provisions of this section shall not vacate their permanent commissions nor be prejudiced in their relative or lineal standing in the Regular Army.

Sec. 115. *Physical examination.*—Every officer and enlisted man of the National Guard who shall be called into the service of the United States as such shall be examined as to his physical fitness under such regulations as the President may prescribe without further commission or enlistment: Provided, That immediately preceding the muster out of an officer or enlisted man called into the active service of the United States he shall be physically examined under rules prescribed by the President of the United States, and the record thereof shall be filed and kept in the War Department.

Sec. 116. *Noncompliance with Federal Act.*—Whenever any State shall, within a limit of time to be fixed by the President, have failed or refused to comply with or enforce any requirement of this Act, or any regulation promulgated thereunder and in aid thereof by the President or the Secretary of War, the National Guard of such State shall be debarred, wholly or in part, as the President may direct, from receiving from the United States any pecuniary or other aid, benefit, or privilege authorized or provided by this Act or any other law.

Sec. 117. *Applicable to land forces only.*—The provisions of this Act in respect to the militia shall be applicable only to militia organized as a land force and not to the Naval Militia, which shall consist of such part of the militia as may be prescribed by the President for each State, Territory, or District: Provided, That each State, Territory, or District maintaining a Naval Militia as herein prescribed may be credited to the extent of the number thereof in the quota that would otherwise be required by section sixty-two of this Act.

Sec. 118. *Necessary rules and regulations.*—The President shall make all necessary rules and regulations and issue such orders as may be necessary for the thorough organization, discipline, and government of the militia provided for in this Act.

Sec. 119. *Annual estimates required.*—The Secretary of War shall cause to be estimated annually the amount necessary for carrying out the provisions of so much of this Act as relates to the militia, and no money shall be expended under said provisions except as shall from time to time be appropriated for carrying them out.

Sec. 120. *Purchase or procurement of military supplies in time of actual or imminent war.*—The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such

individual, firm, company, association, corporation, or organized manufacturing industry.

Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition, or parts of ammunition, or any necessary supplies or equipment for the Army, and any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War, or who shall refuse to furnish such arms, ammunitions, or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War, then, and in either such case, the President, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement herein provided for, is hereby authorized to take immediate possession of any such plant or plants, and through the Ordnance Department of the United States Army, to manufacture therein in time of war, or when war shall be imminent, such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding \$50,000.

The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just.

The Secretary of War shall also make, or cause to be made, a complete list of all privately owned plants in the United States equipped to manufacture arms or ammunition, or the component parts thereof. He shall obtain full and complete information regarding the kind of arms or ammunition, or the component parts thereof, manufactured or that can be manufactured by each such plant, the equipment in each plant, and the maximum capacity thereof. He shall also prepare, or cause to be prepared, a list of privately owned manufacturing plants in the United States capable of being readily transformed into ammunition factories, where the capacity of the plant is sufficient to war-

rant transforming such plant or plants into ammunition factories in time of war or when war shall be imminent; and as to all such plants the Secretary of War shall obtain full and complete information as to the equipment of each such plant, and he shall prepare comprehensive plans for transforming each such plant into an ammunition factory, or a factory in which to manufacture such parts of ammunition as in the opinion of the Secretary of War such plant is best adapted.

The President is hereby authorized, in his discretion, to appoint a Board on Mobilization of Industries Essential for Military Preparedness, nonpartisan in character, and to take all necessary steps to provide for such clerical assistance as he may deem necessary to organize and coordinate the work hereinbefore described.

Sec. 121. *Investigation as to Government manufacture of arms, and so forth.*—The Secretary of War is hereby authorized to appoint a board of five citizens, two of whom shall be civilians and three of whom shall be officers of the Army, to investigate and report to him the feasibility, desirability, and practicability of the Government manufacturing arms, munitions, and equipment, showing in said report the comparative prices of the arms, munitions, and equipment manufactured in Government plants and those manufactured in private plants, the amount of money necessary to build and operate Government plants for the manufacture of arms, munitions, and equipment; showing also what the Government plants and arsenals are now doing in the way of manufacturing arms, munitions, and equipment, and what saving has accrued to the Government by reason of its having manufactured a large part of its own arms, munitions, and equipment for the last four years. And the Secretary of War is hereby directed to transmit said report to Congress on or before January first, nineteen hundred and seventeen.

Sec. 122. *Investigation concerning medals of honor.*—A board to consist of five general officers on the retired list of the Army shall be convened by the Secretary of War, within sixty days after the approval of this Act, for the purpose of investigating and reporting upon past awards or issues of the so-called congressional medal of honor by or through the War Department; this with a view to ascertain what medals of honor, if any, have been awarded or issued for any cause other than distinguished conduct by an officer or enlisted man in action involving actual conflict with an enemy by such officer or enlisted man or by troops with which he was serving at the time of such action. And in any case in which said board shall find and report that said medal was issued for any cause other than that hereinbefore specified the name of the recipient of the medal so issued shall be stricken permanently from the official medal of honor list. It shall be a misdemeanor for him to wear or publicly display said medal, and, if he shall still be in the Army, he shall be required to return said medal to the War Department for cancellation. Said board shall have full and free access to and use of all records pertaining to the award or issue of medals of honor by or through the War Department. The actual and necessary expenses of said board and its members shall be paid out of any appropriations available for contingent expenses of the Army of the War Department.

Sec. 123. *Procurement of gauges, dies, jigs, and so forth, necessary for manufacture of arms, and so forth.*—The Secretary of War be, and he is hereby, authorized to prepare or cause to be prepared, to purchase or otherwise procure, such gauges, dies, jigs, tools, fixtures, and other special aids and appliances, including specifications and detailed drawings, as may be necessary for the immediate manufacture, by the Government and by private manufacturers, of arms, ammunition, and special equipment necessary to arm and equip the land forces likely to be required by the United States in time of war: Provided, That in the expenditure of any sums appropriated to carry out the purposes of this section the existing laws prescribing competition in the procurement of supplies by purchase shall not govern, whenever in the opinion of the Secretary of War such action will be for the best interest of the public service.

Sec. 124. *Nitrate supply.*—The President of the United States is hereby authorized and empowered to make, or cause to be made, such investigation as in his judgment is necessary to determine the best, cheapest, and most available means for the production of nitrates and other products for munitions of war and useful in the manufacture of fertilizers and other useful products by water power or any other power as in his judgment is the best and cheapest to use; and is also hereby authorized and empowered to designate for the exclusive use of the United States, if in his judgment such means is best and cheapest, such site or sites, upon any navigable or nonnavigable river or rivers or upon the public lands, as in his opinion will be necessary for carrying out the purposes of this Act; and is further authorized to construct, maintain, and operate, at or on any site or sites so designated, dams, locks, improvements to navigation, power houses, and other plants and equipment or other means than water power as in his judgment is the best and cheapest, necessary or convenient for the generation of electrical or other power and for the production of nitrates or other products needed for munitions of war and useful in the manufacture of fertilizers and other useful products.

The President is authorized to lease, purchase, or acquire, by condemnation, gift, grant, or devise, such lands and rights of way as may be necessary for the construction and operation of such plants, and to take from any lands of the United States, or to purchase or acquire by condemnation materials, minerals, and processes, patented or otherwise, necessary for the construction and operation of such plants and for the manufacture of such products.

The products of such plants shall be used by the President for military and naval purposes to the extent that he may deem necessary, and any surplus which he shall determine is not required shall be sold and disposed of by him under such regulations as he may prescribe.

The President is hereby authorized and empowered to employ such officers, agents, or agencies as may in his discretion be necessary to enable him to carry out the purposes herein specified, and to authorize and require such officers, agents, or agencies to perform any and all of the duties imposed upon him by the provisions hereof.

The sum of \$20,000,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, available until expended,

to enable the President of the United States to carry out the purposes herein provided for.

The plant or plants provided for under this Act shall be constructed and operated solely by the Government and not in conjunction with any other industry or enterprise carried on by private capital.

In order to raise the money appropriated by this Act and necessary to carry its provisions into effect, the Secretary of the Treasury, upon the request of the President of the United States, may issue and sell, or use for such purpose or construction hereinabove authorized, any of the bonds of the United States now available in the Treasury of the United States under the Act of August fifth, nineteen hundred and nine, the Act of February fourth, nineteen hundred and ten, and the Act of March second, nineteen hundred and eleven, relating to the issue of bonds for the construction of the Panama Canal, to a total amount not to exceed \$20,000,000: Provided, That any Panama Canal bonds issued and sold or used under the provisions of this section may be made payable at such time after issue as the Secretary of the Treasury, in his discretion, may deem advisable, and fix, instead of fifty years after date of issue, as in said Act of August fifth, nineteen hundred and nine, not exceeding fifty years.

Sec. 125. *Protection of the uniform.*—It shall be unlawful for any person not an officer or enlisted man of the United States Army, Navy, or Marine Corps, to wear the duly prescribed uniform of the United States Army, Navy, or Marine Corps, or any distinctive part of such uniform, or a uniform any part of which is similar to a distinctive part of the duly prescribed uniform of the United States Army, Navy, or Marine Corps: Provided, That the foregoing provision shall not be construed so as to prevent officers or enlisted men of the National Guard from wearing, in pursuance of law and regulations, the uniform lawfully prescribed to be worn by such officers or enlisted men of the National Guard; nor to prevent members of the organization known as the Boy Scouts of America, or the Naval Militia, or such other organizations as the Secretary of War may designate, from wearing their prescribed uniforms; nor to prevent persons who in time of war have served honorably as officers of the United States Army, Navy, or Marine Corps, Regular or Volunteer, and whose most recent service was terminated by an honorable discharge, muster out, or resignation, from wearing, upon occasions of ceremony, the uniform of the highest grade they have held by brevet or other commission in such Regular or Volunteer service; nor to prevent any person who has been honorably discharged from the United States Army, Navy, or Marine Corps Regular or Volunteer, from wearing his uniform from the place of his discharge to his home, within three months after the date of such discharge; nor to prevent the members of military societies composed entirely of honorably discharged officers or enlisted men, or both, of the United States Army, Navy, or Marine Corps, Regular or Volunteer, from wearing, upon occasions of ceremony, the uniform duly prescribed by such societies to be worn by the members thereof; nor to prevent the instructors and members of the duly organized cadet corps of a State university, State college, or public high school offering a regular course in military instruction from wearing the uniform duly

prescribed by the authorities of such university, college, or public high school for wear by the instructors and members of such cadet corps; nor to prevent the instructors and members of the duly organized cadet corps of any other institution of learning offering a regular course in military instruction, and at which an officer or enlisted man of the United States Army, Navy, or Marine Corps is lawfully detailed for duty as instructor in military science and tactics, from wearing the uniform duly prescribed by the authorities of such institution of learning for wear by the instructors and members of such cadet corps; nor to prevent civilians attendant upon a course of military or naval instruction authorized and conducted by the military or naval authorities of the United States from wearing, while in attendance upon such course of instruction, the uniform authorized and prescribed by such military or naval authorities for wear during such course of instruction; nor to prevent any person from wearing the uniform of the United States Army, Navy, or Marine Corps in any playhouse or theater or in moving-picture films while actually engaged in representing therein a military or naval character not tending to bring discredit or reproach upon the United States Army, Navy, or Marine Corps: Provided further, That the uniforms worn by officers or enlisted men of the National Guard, or by the members of the military societies or the instructors and members of the cadet corps referred to in the preceding proviso shall include some distinctive mark or insignia to be prescribed by the Secretary of War to distinguish such uniforms from the uniforms of the United States Army, Navy, and Marine Corps: And provided further, That the members of the military societies and the instructors and members of the cadet corps hereinbefore mentioned shall not wear the insignia of rank prescribed to be worn by officers of the United States Army, Navy, or Marine Corps, or any insignia of rank similar thereto.

Any person who offends against the provisions of this section shall, on conviction, be punished by a fine not exceeding \$300, or by imprisonment not exceeding six months, or by both such fine and imprisonment.

Sec. 126. On and after July first, nineteen hundred and sixteen, an enlisted man when discharged from the service, except by way of punishment for an offense, shall receive $3\frac{1}{2}$ cents per mile from the place of his discharge to the place of his acceptance for enlistment, enrollment, or original muster into the service, at his option: Provided, That for sea travel on discharge transportation and subsistence only shall be furnished to enlisted men.

Sec. 127. Nothing in this Act shall be held or construed so as to discharge any officer from the Regular Army or to deprive him of the commission which he now holds therein.

Sec. 128. All laws and parts of laws in so far as they are inconsistent with this Act are hereby repealed.

Approved, June 3, 1916.

[Public—No. 132—65th Congress. S. 3528.]

An Act to suspend for the period of the present war sections forty-five, forty-six, and fifty-six of an Act entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June third, nineteen hundred and sixteen, and for other purposes. [April 17, 1918.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections forty-five, forty-six, and fifty-six of an Act entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June third, nineteen hundred and sixteen, be, and they hereby are, suspended for and during the period of the present war, but for such period only, and that upon the termination of said war said suspension shall cease and terminate and said sections shall thereupon be and become reinstated and of the same force and effect as if this suspension had not been made.

Sec. 2. That during the present war the President be, and he hereby is, authorized to detail such number of officers of the Army of the United States, either active or retired, not above the grade of colonel, as may be necessary for duty as professors and assistant professors of military science and tactics at institutions where one or more units of the Reserve Officers' Training Corps are maintained; but the total number of active officers so detailed at educational institutions shall not exceed one thousand, and no officer shall be so detailed who has not had at least one year's commissioned service in the Army of the United States. Retired officers below the grade of lieutenant colonel so detailed shall receive the full pay and allowances of their grade, and retired officers above the grade of major so detailed shall receive the same pay and allowances as a retired major would receive under like detail.

Sec. 3. That during the present war the President be, and he hereby is, authorized to detail for duty at institutions where one or more units of the Reserve Officers' Training Corps are maintained such number of enlisted men, either active or retired, of the Army of the United States as he may deem necessary, but the active noncommissioned officers so detailed shall have had at least one year's active service, and the total number of such active noncommissioned officers so detailed shall not exceed three thousand, and shall be additional in their respective grades to those otherwise authorized for the Army of the United States. While detailed under the provisions of this section retired noncommissioned officers of the Army of the United States shall receive active pay and allowances.

Sec. 4. That during the present war such arms, tentage, and equipment as the Secretary of War shall deem necessary for proper military training shall be supplied by the Government to schools and colleges other than those provided for in section forty-seven of the national-defense Act approved June third, nineteen hundred and sixteen, having a course of military training prescribed by the Secretary of War, and having not less than one hundred physically fit male students above the age of fourteen years, under such rules and regulations as he may prescribe; and the Secretary of War is hereby authorized during the

present war to detail commissioned and noncommissioned officers of the Army of the United States to said schools and colleges, detailing not less than one such officer or noncommissioned officer to each five hundred students under military instruction; but no officer or noncommissioned officer shall be so detailed who has not had at least one year's active service in the Army of the United States.

Approved, April 17, 1918.

[Public—No. 158—65th Congress. S. 4400.]

An Act to amend section fifteen of the Act approved June third, nineteen hundred and sixteen, entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," as amended by the Act approved May twelfth, nineteen hundred and seventeen, entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes." [May 25, 1918.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section fifteen of the Act approved June third, nineteen hundred and sixteen, entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," as amended by the Act approved May twelfth, nineteen hundred and seventeen, entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes," be, and the same is hereby, amended to read as follows:

"Sec. 15. *Chaplains*.—The President is authorized to appoint, by and with the advice and consent of the Senate, chaplains in the Army at the rate of not to exceed, including chaplains now in the service, one for each one thousand two hundred officers and men in all branches of the Military Establishment, with rank, pay, and allowances as now authorized by law: Provided, That there shall be assigned at least one chaplain for each regiment of Cavalry, Infantry, Field Artillery, and Engineers: Provided further, That the persons appointed under this Act shall be duly accredited by some religious denomination or organization and of good standing therein, under such regulations as may be prescribed by the Secretary of War: And provided further, That no person shall be appointed chaplain in the Army who on the date of appointment is more than forty-five years of age."

Approved, May 25, 1918.

[Public—No. 193—65th Congress.]

Army Appropriations Act [July 9, 1918].

[Ch. XXI, "Amending the National Defense Act."]

See post, No. 21.

2. NAVAL APPROPRIATIONS ACT

(Preference for Military Traffic)

[Public—No. 241—64th Congress.]

An Act making appropriations for the naval service for the fiscal year ending June 30, 1917, and for other purposes. [August 29, 1916, 39 Stat. 604.]

Section six of an Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as amended March second, eighteen hundred and eighty-nine, and June twenty-ninth, nineteen hundred and six, which reads:

"That in time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given over all other traffic for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic,"
be amended to read as follows:

"That in time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given over all other traffic for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned."

3. SHIPPING BOARD ACT

[Public—No. 260—64th Congress. H. R. 15455.]

An Act to establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its Territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States; and for other purposes. [September 7, 1916, Comp. St. 1916, §§ 8146a-8146r.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when used in this Act:

The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade:

Provided, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."

The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this Act" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country.

Sec. 2. That within the meaning of this Act no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president and managing directors are citizens of the United States and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof.

The provisions of this Act shall apply to receivers and trustees of all persons to whom the Act applies, and to the successors or assignees of such persons.

Sec. 3. That a board is hereby created, to be known as the United States Shipping Board, and hereinafter referred to as the board. The board shall be composed of five commissioners, to be appointed by the President, by and with the advice and consent of the Senate; said board shall annually elect one of its members as chairman and one as vice chairman.

Sec. 5. That the board, with the approval of the President, is authorized to have constructed and equipped in American shipyards and navy yards or elsewhere, giving preference, other things being equal, to domestic yards, or to purchase, lease, or charter, vessels suitable, as far as the commercial requirements of the marine trade of the United States may permit, for use as naval auxiliaries or Army transports, or for other naval or military purposes, and to make necessary repairs on and alterations of such vessels: Provided, That neither the board nor any corporation formed under section eleven in which the United States is then a stockholder shall purchase, lease, or charter any vessel—

(a) Which is then engaged in the foreign or domestic commerce of the United States, unless it is about to be withdrawn from such com-

merce without any intention on the part of the owner to return it thereto within a reasonable time;

(b) Which is under the registry or flag of a foreign country which is then engaged in war;

(c) Which is not adapted, or can not by reasonable alterations and repairs be adapted, to the purposes specified in this section;

(d) Which, upon expert examination made under the direction of the board, a written report of such examination being filed as a public record, is not without alteration or repair found to be at least seventy-five per centum as efficient as at the time it was originally put in commission as a seaworthy vessel.

Sec. 6. That the President may transfer either permanently or for limited periods to the board such vessels belonging to the War or Navy Department as are suitable for commercial uses and not required for military or naval use in time of peace, and cause to be transferred to the board vessels owned by the Panama Railroad Company and not required in its business.

Sec. 7. That the board, upon terms and conditions prescribed by it and approved by the President, may charter, lease, or sell to any person, a citizen of the United States, any vessel so purchased, constructed, or transferred.

Sec. 8. That when any vessel purchased or constructed by or transferred to the board as herein provided, and owned by the United States, becomes, in the opinion of the board, unfit for the purposes of this Act, it shall be appraised and sold at public or private competitive sale after due advertisement free from the conditions and restrictions of this Act.

Sec. 9. That any vessel purchased, chartered, or leased from the board may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto: Provided, That foreign-built vessels admitted to American registry or enrollment and license under this Act, and vessels owned, chartered, or leased by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered to any person a citizen of the United States, as provided in this Act, may engage in the coastwise trade of the United States.

Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. No such vessel, without the approval of the board, shall be transferred to a foreign registry or flag, or sold; nor, except under regulations prescribed by the board, be chartered or leased.

When the United States is at war, or during any national emergency the existence of which is declared by proclamation of the President, no vessel registered or enrolled and licensed under the laws of the

United States shall, without the approval of the board, be sold, leased, or chartered to any person not a citizen of the United States, or transferred to a foreign registry or flag. No vessel registered or enrolled and licensed under the laws of the United States, or owned by any person a citizen of the United States, except one which the board is prohibited from purchasing, shall be sold to any person not a citizen of the United States or transferred to a foreign registry or flag, unless such vessel is first tendered to the board at the price in good faith offered by others, or, if no such offer, at a fair price to be determined in the manner provided in section ten.

Any vessel sold, chartered, leased, transferred, or operated in violation of this section shall be forfeited to the United States, and whoever violates any provision of this section shall be guilty of a misdemeanor and subject to a fine of not more than \$5,000 or to imprisonment of not more than five years, or both such fine and imprisonment.

Sec. 10. That the President, upon giving to the person interested such reasonable notice in writing as in his judgment the circumstances permit, may take possession, absolutely or temporarily, for any naval or military purpose, of any vessel purchased, leased, or chartered from the board: Provided, That if, in the judgment of the President, an emergency exists requiring such action he may take possession of any such vessel without notice.

Thereafter, upon ascertainment by agreement or otherwise, the United States shall pay the person interested the fair actual value based upon normal conditions at the time of taking of the interest of such person in every vessel taken absolutely, or if taken for a limited period, the fair charter value under normal conditions for such period. In case of disagreement as to such fair value it shall be determined by appraisers, one to be appointed by the board, one by the person interested, and a third by the two so appointed. The finding of such appraisers shall be final and binding upon both parties.

Sec. 11. That the board, if in its judgment such action is necessary to carry out the purposes of this Act, may form under the laws of the District of Columbia one or more corporations for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States. The total capital stock thereof shall not exceed \$50,000,000. The board may, for and on behalf of the United States, subscribe to, purchase, and vote not less than a majority of the capital stock of any such corporation, and do all other things in regard thereto necessary to protect the interests of the United States and to carry out the purposes of this Act. The board, with the approval of the President, may sell any or all of the stock of the United States in such corporation, but at no time shall it be a minority stockholder therein: Provided, That no corporation in which the United States is a stockholder, formed under the authority of this section, shall engage in the operation of any vessel constructed, purchased, leased, chartered, or transferred under the authority of this Act unless the board shall be unable, after a bona fide effort, to contract with any person a citizen of the United States for the purchase, lease, or charter of such vessel under such terms and conditions as may be prescribed by the board.

The board shall give public notice of the fact that vessels are offered and the terms and conditions upon which a contract will be made, and shall invite competitive offerings. In the event the board shall, after full compliance with the terms of this proviso, determine that it is unable to enter into a contract with such private parties for the purchase, lease, or charter of such vessel, it shall make a full report to the President, who shall examine such report, and if he shall approve the same he shall make an order declaring that the conditions have been found to exist which justify the operation of such vessel by a corporation formed under the provisions of this section.

At the expiration of five years from the conclusion of the present European war the operation of vessels on the part of any such corporation in which the United States is then a stockholder shall cease and the said corporation stand dissolved. The date of the conclusion of the war shall be declared by proclamation of the President. The vessels and other property of any such corporation shall revert to the board. The board may sell, lease, or charter such vessels as provided in section seven and shall dispose of the property other than vessels on the best available terms and, after payment of all debts and obligations, deposit the proceeds thereof in the Treasury to its credit. All stock in such corporations owned by others than the United States at the time of dissolution shall be taken over by the board at a fair and reasonable value and paid for with funds to the credit of the board. In case of disagreement, such value shall be determined in the manner provided in section ten.

Sec. 14. That no common carrier by water shall directly or indirectly—

First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term "deferred rebate" in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat

or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than \$25,000 for each offense.

Sec. 15. That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of \$1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Sec. 16. That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates then established and enforced on the line of such carrier, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Sec. 17. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

Sec. 18. That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Every such carrier shall file with the board and keep open to public inspection, in the form and manner and within the time prescribed by

the board, the maximum rates, fares, and charges for or in connection with transportation between points on its own route; and if a through route has been established, the maximum rates, fares, and charges for or in connection with transportation between points on its own route and points on the route of any other carrier by water.

No such carrier shall demand, charge, or collect a greater compensation for such transportation than the rates, fares, and charges filed in compliance with this section, except with the approval of the board and after ten days' public notice in the form and manner prescribed by the board, stating the increase proposed to be made; but the board for good cause shown may waive such notice.

Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

Sec. 19. That whenever a common carrier by water in interstate commerce reduces its rates on the carriage of any species of freight to or from competitive points below a fair and remunerative basis with the intent of driving out or otherwise injuring a competitive carrier by water, it shall not increase such rates unless after hearing the board finds that such proposed increase rests upon changed conditions other than the elimination of said competition.

Sec. 33. That this Act shall not be construed to affect the power or jurisdiction of the Interstate Commerce Commission, nor to confer upon the board concurrent power or jurisdiction over any matter with in the power or jurisdiction of such commission; nor shall this Act be construed to apply to intrastate commerce.

Sec. 36. The Secretary of the Treasury is authorized to refuse a clearance to any vessel or other vehicle laden with merchandise destined for a foreign or domestic port whenever he shall have satisfactory reason to believe that the master, owner, or other officer of such vessel or other vehicle refuses or declines to accept or receive freight or cargo in good condition tendered for such port of destination or for some intermediate port of call, together with the proper freight or transportation charges therefor, by any citizen of the United States, unless the same is fully laden and has no space accommodations for the freight or cargo so tendered, due regard being had for the proper loading of such vessel or vehicle, or unless such freight or cargo consists of merchandise for which such vessel or vehicle is not adaptable.

Approved, September 7, 1916.

[Public—No. 198—65th Congress. H. R. 12100.]

An Act to Amend the Act approved September seventh, nineteen hundred and sixteen, entitled "An Act to establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its Territories and possessions and with foreign countries; to regulate carriers by water in the foreign and interstate commerce of the United States; and for other purposes." [July 15, 1918.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first section of the Act approved September seventh, nineteen hundred and sixteen, entitled "An Act to establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its Territories and possessions and with foreign countries; to regulate carriers by water in the foreign and interstate commerce of the United States; and for other purposes," is hereby amended by adding at the end thereof two paragraphs, as follows:

"The term 'vessel' includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water.

"The term 'documented under the laws of the United States,' means 'registered, enrolled, or licensed under the laws of the United States.' "

Sec. 2. That section two of said act is hereby amended by adding at the end of the first paragraph thereof a paragraph, as follows:

"The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States."

Sec. 3. That section nine of said act is hereby amended to read as follows:

"Sec. 9. That any vessel purchased, chartered, or leased from the board may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto: Provided, That foreign-built vessels admitted to American registry or enrollment and li-

cense under this Act, and vessels owned, chartered, or leased by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered to any person a citizen of the United States, as provided in this Act may engage in the coastwise trade of the United States while owned, leased, or chartered by such a person.

"Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. No such vessel, without the approval of the board, shall be transferred to a foreign registry or flag, or sold; nor, except under regulations prescribed by the board, be chartered or leased.

"No vessel documented under the laws of the United States or owned by any person a citizen of the United States or by a corporation organized under the laws of the United States or of any State, Territory, District, or possession thereof, except one which the board is prohibited from purchasing, shall be sold to any person not a citizen of the United States or transferred to or placed under a foreign registry or flag, unless such vessel is first tendered to the board at the price in good faith offered by others, or, if no such offer, at a fair price to be determined in the manner provided in section ten.

"Any vessel sold, chartered, leased, transferred to or placed under a foreign registry or flag, or operated, in violation of any provision of this section shall be forfeited to the United States, and whoever violates any provision of this section shall be guilty of a misdemeanor and subject to a fine of not more than \$5,000 or to imprisonment for not more than five years, or both."

Sec. 4. That said Act is hereby amended by adding at the end thereof eight sections, as follows:

"Sec. 37. That when the United States is at war or during any national emergency, the existence of which is declared by proclamation of the President, it shall be unlawful, without first obtaining the approval of the board:

"(a) To transfer to or place under any foreign registry or flag any vessel owned in whole or in part by any person a citizen of the United States or by a corporation organized under the laws of the United States, or of any State, Territory, District, or possession thereof; or

"(b) To sell, mortgage, lease, charter, deliver, or in any manner transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, (1) any such vessel or any interest therein, or (2) any vessel documented under the laws of the United States, or any interest therein, or (3) any shipyard, dry dock, ship-building or ship-repairing plant or facilities, or any interest therein; or

"(c) To enter into any contract, agreement, or understanding to construct a vessel within the United States for or to be delivered to any person not a citizen of the United States, without expressly stipulat-

ing that such construction shall not begin until after the war or emergency proclaimed by the President has ended; or

"(d) To make any agreement or effect any understanding whereby there is vested in or for the benefit of any person not a citizen of the United States, the controlling interest or a majority of the voting power in a corporation which is organized under the laws of the United States, or of any State, Territory, District, or possession thereof, and which owns any vessel, shipyard, dry dock, or ship-building or ship-repairing plant or facilities; or

"(e) To cause or procure any vessel constructed in whole or in part within the United States, which has never cleared for any foreign port, to depart from a port of the United States before it has been documented under the laws of the United States.

"Whoever violates, or attempts or conspires to violate, any of the provisions of this section shall be guilty of a misdemeanor, punishable by a fine of not more than \$5,000 or by imprisonment for not more than five years, or both.

"Any vessel, shipyard, dry dock, ship-building, or ship-repairing plant or facilities, or interest therein, sold, mortgaged, leased, chartered, delivered, transferred, or documented, or agreed to be sold, mortgaged, leased, chartered, delivered, transferred, or documented, in violation of any of the provisions of this section, and any stocks, bonds or other securities sold or transferred, or agreed to be sold or transferred, in violation of any of such provisions, or any vessel departing in violation of the provisions of subdivision (e), shall be forfeited to the United States.

"Any such sale, mortgage, lease, charter, delivery, transfer, documentation, or agreement therefor shall be void, whether made within or without the United States, and any consideration paid therefor or deposited in connection therewith shall be recoverable at the suit of the person who has paid or deposited the same, or of his successors or assigns, after the tender of such vessel, shipyard, dry dock, ship building or ship-repairing plant or facilities, or interest therein, or of such stocks, bonds or other securities, to the person entitled thereto, or after forfeiture thereof to the United States, unless the person to whom the consideration was paid, or in whose interest it was deposited, entered into the transaction in the honest belief that the person who paid or deposited such consideration was a citizen of the United States.

"Sec. 42. That any vessel registered, enrolled or licensed under the laws of the United States shall be deemed to continue to be documented under the laws of the United States within the meaning of subdivision (b) of section thirty-seven, until such registry, enrollment, or license is surrendered with the approval of the board, the provisions of any other Act of Congress to the contrary notwithstanding.

"Sec. 43. That the fact that a war or emergency has ended shall, for the purposes of this Act, be evidenced by a proclamation of the President.

"Sec. 44. That this Act may be cited as 'Shipping Act, 1916.'"

Approved, July 15, 1918.

4. NAVAL EMERGENCY FUND ACT

(Requisitioning of Factories, etc.)

[Public—No. 391—64th Congress. H. R. 20632.]

An Act Making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for other purposes. [March 4, 1917, 39 Stat. 1192.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * *

(a) That the word "person" as used in paragraphs (b), (c), next hereafter shall include any individual, trustee, firm, association, company, or corporation. The word "ship" shall include any boat, vessel, submarine, or any form of aircraft, and the parts thereof. The words "war material" shall include arms, armament, ammunition, stores, supplies, and equipment for ships and airplanes, and everything required for or in connection with the production thereof. The word "factory" shall include any factory, workshop, engine works, building used for manufacture, assembling, construction, or any process, and any shipyard or dockyard. The words "United States" shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States.

(b) That in time of war, or of national emergency arising prior to March first, nineteen hundred and eighteen, to be determined by the President by proclamation, the President is hereby authorized and empowered, in addition to all other existing provisions of law:

First. Within the limits of the amounts appropriated therefor, to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind and quantity usually produced or capable of being produced by such person. Compliance with all such orders shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts theretofore placed with such person. If any person owning, leasing, or operating any factory equipped for the building or production of ships or war material for the Navy shall refuse or fail to give to the United States such preference in the execution of such an order, or shall refuse to build, supply, furnish, or manufacture the kind, quantity, or quality of ships or war material so ordered at such reasonable price as shall be determined by the President, the President may take immediate possession of any factory of such person, or of any part thereof without taking possession of the entire factory, and may use the same at such times and in such manner as he may consider necessary or expedient.

Second. Within the limit of the amounts appropriated therefor, to modify or cancel any existing contract for the building, production, or purchase of ships or war material; and if any contractor shall refuse or fail to comply with the contract as so modified the President may take immediate possession of any factory of such contractor, or any part thereof without taking possession of the entire factory, and

may use the same at such times and in such manner as he may consider necessary or expedient.

Third. To require the owner or occupier of any factory in which ships or war material are built or produced to place at the disposal of the United States the whole or any part of the output of such factory, and, within the limit of the amounts appropriated therefor, to deliver such output or parts thereof in such quantities and at such times as may be specified in the order at such reasonable price as shall be determined by the President.

Fourth. To requisition and take over for use or operation by the Government any factory, or any part thereof without taking possession of the entire factory, whether the United States has or has not any contract or agreement with the owner or occupier of such factory.

That all authority granted to the President in this paragraph, to be exercised in time of national emergency, shall cease on March first, nineteen hundred and eighteen.

(d) That whenever the United States shall cancel or modify any contract, make use of, assume, occupy, requisition, or take over any factory or part thereof, or any ships or war material, in accordance with the provisions of paragraph (b), it shall make just compensation therefor, to be determined by the President, and if the amount thereof so determined by the President is unsatisfactory to the person entitled to receive the same, such person shall be paid fifty per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said fifty per centum shall make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

5. WAR RESOLUTION

Joint Resolution declaring that a state of war exists between the Imperial German Government and the Government and the people of the United States and making provision to prosecute the same.
[Approved April 6, 1917. 40 Stat. 1.]

Whereas the Imperial German Government has committed repeated acts of war against the Government and the people of the United States of America: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States.

6. SELECTIVE SERVICE ACT

[Public—No. 12—65th Congress. H. R. 3545.]

An Act to authorize the President to increase temporarily the Military Establishment of the United States. [May 18, 1917.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in view of the existing emergency, which demands the raising of troops in addition to those now available, the President be, and he is hereby, authorized—

First. Immediately to raise, organize, officer, and equip all or such number of increments of the Regular Army provided by the national defense Act approved June third, nineteen hundred and sixteen, or such parts thereof as he may deem necessary; to raise all organizations of the Regular Army, including those added by such increments, to the maximum enlisted strength authorized by law. Vacancies in the Regular Army created or caused by the addition of increments as herein authorized which can not be filled by promotion may be filled by temporary appointment for the period of the emergency or until replaced by permanent appointments or by provisional appointments made under the provisions of section twenty-three of the national defense Act, approved June third, nineteen hundred and sixteen, and hereafter provisional appointments under said section may be terminated whenever it is determined, in the manner prescribed by the President, that the officer has not the suitability and fitness requisite for permanent appointment.

Second. To draft into the military service of the United States, organize, and officer, in accordance with the provisions of section one hundred and eleven of said national defense Act, so far as the provisions of said section may be applicable and not inconsistent with the terms of this Act, any or all members of the National Guard and of the National Guard Reserves, and said members so drafted into the military service of the United States shall serve therein for the period of the existing emergency unless sooner discharged: Provided, That when so drafted the organizations or units of the National Guard shall, so far as practicable, retain the State designations of their respective organizations.

Third. To raise by draft as herein provided, organize and equip an additional force of five hundred thousand enlisted men, or such part or parts thereof as he may at any time deem necessary, and to provide the necessary officers, line and staff, for said force and for organizations of the other forces hereby authorized, or by combining organizations of said other forces, by ordering members of the Officers Reserve Corps to temporary duty in accordance with the provisions of section thirty-eight of the national defense Act approved June third, nineteen hundred and sixteen; by appointment from the Regular Army, the Officers' Reserve Corps, from those duly qualified and registered pursuant to section twenty-three of the Act of Congress approved January twenty-first, nineteen hundred and three (Thirty-second Statutes at Large, page seven hundred and seventy-five), from

the members of the National Guard drafted into the service of the United States, from those who have been graduated from educational institutions at which military instruction is compulsory, or from those who have had honorable service in the Regular Army, the National Guard, or in the volunteer forces, or from the country at large; by assigning retired officers of the Regular Army to active duty with such force with their rank on the retired list and the full pay and allowances of their grade; or by the appointment of retired officers and enlisted men, active or retired, of the Regular Army as commissioned officers in such forces: Provided, That the organization of said force shall be the same as that of the corresponding organizations of the Regular Army: Provided further, That the President is authorized to increase or decrease the number of organizations prescribed for the typical brigades, divisions, or army corps of the Regular Army, and to prescribe such new and different organizations and personnel for army corps, divisions, brigades, regiments, battalions, squadrons, companies, troops, and batteries as the efficiency of the service may require: Provided further, That the number of organizations in a regiment shall not be increased nor shall the number of regiments be decreased: Provided further, That the President in his discretion may organize, officer, and equip for each Infantry and Cavalry brigade three machine-gun companies, and for each Infantry and Cavalry division four machine-gun companies, all in addition to the machine-gun companies comprised in organizations included in such brigades and divisions: Provided further, That the President in his discretion may organize for each division one armored motor-car machine-gun company. The machine-gun companies organized under this section shall consist of such commissioned and enlisted personnel and be equipped in such manner as the President may prescribe: And provided further, That officers with rank not above that of colonel shall be appointed by the President alone, and officers above that grade by the President by and with the advice and consent of the Senate: Provided further, That the President may in his discretion recommission in the Coast Guard persons who have heretofore held commissions in the Revenue-Cutter Service or the Coast Guard and have left the service honorably, after ascertaining that they are qualified for service physically, morally, and as to age and military fitness.

Fourth. The President is further authorized, in his discretion and at such time as he may determine, to raise and begin the training of an additional force of five hundred thousand men organized, officered, and equipped, as provided for the force first mentioned in the preceding paragraph of this section.

Fifth. To raise by draft, organize, equip, and officer, as provided in the third paragraph of this section, in addition to and for each of the above forces, such recruit training units as he may deem necessary for the maintenance of such forces at the maximum strength.

Sixth. To raise, organize, officer, and maintain during the emergency such number of ammunition batteries and battalions, depot batteries and battalions, and such artillery parks, with such numbers and grades of personnel as he may deem necessary. Such organizations shall be officered in the manner provided in the third paragraph of this

section, and enlisted men may be assigned to said organizations from any of the forces herein provided for or raised by selective draft as by this Act provided.

Seventh. The President is further authorized to raise and maintain by voluntary enlistment, to organize, and equip, not to exceed four infantry divisions, the officers of which shall be selected in the manner provided by paragraph three of section one of this Act: Provided, That the organization of said force shall be the same as that of the corresponding organization of the Regular Army: And provided further, That there shall be no enlistments in said force of men under twenty-five years of age at time of enlisting: And provided further, That no such volunteer force shall be accepted in any unit smaller than a division.

Sec. 2. That the enlisted men required to raise and maintain the organizations of the Regular Army and to complete and maintain the organizations embodying the members of the National Guard drafted into the service of the United States, at the maximum legal strength as by this Act provided, shall be raised by voluntary enlistment, or if and whenever the President decides that they can not effectually be so raised or maintained, then by selective draft; and all other forces hereby authorized, except as provided in the seventh paragraph of section one, shall be raised and maintained by selective draft exclusively; but this provision shall not prevent the transfer to any force of training cadres from other forces. Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act. Quotas for the several States, Territories, and the District of Columbia, or subdivisions thereof, shall be determined in proportion to the population thereof, and credit shall be given to any State, Territory, District, or subdivision thereof, for the number of men who were in the military service of the United States as members of the National Guard on April first, nineteen hundred and seventeen, or who have since said date entered the military service of the United States from any such State, Territory, District, or subdivision either as members of the Regular Army or the National Guard. All persons drafted into the service of the United States and all officers accepting commissions in the forces herein provided for shall, from the date of said draft or acceptance, be subject to the laws and regulations governing the Regular Army, except as to promotions, so far as such laws and regulations are applicable to persons whose permanent retention in the military service on the active or retired list is not contemplated by existing law, and those drafted shall be required to serve for the period of the existing emergency unless sooner discharged: Provided, That the President is authorized to raise and maintain by voluntary enlistment or draft, as herein provided, special and technical troops as he may deem necessary, and to embody them into organizations and to officer them as provided in the third paragraph of section one and section nine of this Act. Organiza-

tions of the forces herein provided for, except the Regular Army and the divisions authorized in the seventh paragraph of section one, shall, as far as the interests of the service permit, be composed of men who come, and of officers who are appointed from, the same State or locality.

Sec. 3. No bounty shall be paid to induce any person to enlist in the military service of the United States; and no person liable to military service shall hereafter be permitted or allowed to furnish a substitute for such service; nor shall any substitute be received, enlisted, or enrolled in the military service of the United States; and no such person shall be permitted to escape such service or to be discharged therefrom prior to the expiration of his term of service by the payment of money or any other valuable thing whatsoever as consideration for his release from military service or liability thereto.

Sec. 4. That the Vice President of the United States, the officers, legislative, executive, and judicial, of the United States and of the several States, Territories, and the District of Columbia, regular or duly ordained ministers of religion, students who at the time of the approval of this Act are preparing for the ministry in recognized theological or divinity schools, and all persons in the military and naval service of the United States shall be exempt from the selective draft herein prescribed; and nothing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant; and the President is hereby authorized to exclude or discharge from said selective draft and from the draft under the second paragraph of section one hereof, or to draft for partial military service only from those liable to draft as in this Act provided, persons of the following classes: County and municipal officials; customhouse clerks; persons employed by the United States in the transmission of the mail; artificers and workmen employed in the armories, arsenals, and navy yards of the United States, and such other persons employed in the service of the United States as the President may designate; pilots; mariners actually employed in the sea service of any citizen or merchant within the United States; persons engaged in industries, including agriculture found to be necessary to the maintenance of the Military Establishment or the effective operation of the military forces or the maintenance of national interest during the emergency; those in a status with respect to persons dependent upon them for support which renders their exclusion or discharge advisable; and those found to be physically or morally deficient. No exemption or exclusion shall continue when a cause therefor no longer exists: Provided, That notwithstanding the exemptions enumerated herein, each State, Territory, and the District of Columbia shall be required to supply its quota in

the proportion that its population bears to the total population of the United States.

The President is hereby authorized, in his discretion, to create and establish throughout the several States and subdivisions thereof and in the Territories and the District of Columbia local boards, and where, in his discretion, practicable and desirable, there shall be created and established one such local board in each county or similar subdivision in each State, and one for approximately each thirty thousand of population in each city of thirty thousand population or over, according to the last census taken or estimates furnished by the Bureau of Census of the Department of Commerce. Such boards shall be appointed by the President, and shall consist of three or more members, none of whom shall be connected with the Military Establishment, to be chosen from among the local authorities of such subdivisions or from other citizens residing in the subdivision or area in which the respective boards will have jurisdiction under the rules and regulations prescribed by the President. Such boards shall have power within their respective jurisdictions to hear and determine, subject to review as hereinafter provided, all questions of exemption under this Act, and all questions of or claims for including or discharging individuals or classes of individuals from the selective draft, which shall be made under rules and regulations prescribed by the President, except any and every question or claim for including or excluding or discharging persons or classes of persons from the selective draft under the provisions of this Act authorizing the President to exclude or discharge from the selective draft "Persons engaged in industries, including agriculture, found to be necessary to the maintenance of the Military Establishment, or the effective operation of the military forces, or the maintenance of national interest during the emergency."

The President is hereby authorized to establish additional boards, one in each Federal judicial district of the United States, consisting of such number of citizens, not connected with the Military Establishment, as the President may determine, who shall be appointed by the President. The President is hereby authorized, in his discretion, to establish more than one such board in any Federal judicial district of the United States, or to establish one such board having jurisdiction of an area extending into more than one Federal judicial district.

Such district boards shall review on appeal and affirm, modify, or reverse any decision of any local board having jurisdiction in the area in which any such district board has jurisdiction under the rules and regulations prescribed by the President. Such district boards shall have exclusive original jurisdiction within their respective areas to hear and determine all questions or claims for including or excluding or discharging persons or classes of persons from the selective draft, under the provisions of this Act, not included within the original jurisdiction of such local boards.

The decisions of such district boards shall be final except that, in accordance with such rules and regulations as the President may prescribe, he may affirm, modify or reverse any such decision.

Any vacancy in any such local board or district board shall be filled

by the President, and any member of any such local board or district board may be removed and another appointed in his place by the President, whenever he considers that the interest of the nation demands it.

The President shall make rules and regulations governing the organization and procedure of such local boards and district boards, and providing for and governing appeals from such local boards to such district boards, and reviews of the decisions of any local board by the district board having jurisdiction, and determining and prescribing the several areas in which the respective local boards and district boards shall have jurisdiction, and all other rules and regulations necessary to carry out the terms and provisions of this section, and shall provide for the issuance of certificates of exemption, or partial or limited exemptions, and for a system to exclude and discharge individuals from selective draft.

Sec. 5. That all male persons between the ages of twenty-one and thirty both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction; and any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a misdemeanor and shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered: Provided, That in the call of the docket precedence shall be given, in courts trying the same, to the trial of criminal proceedings under this Act: Provided further, That persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided: Provided further, That in the case of temporary absence from actual place of legal residence of any person liable to registration as provided herein such registration may be made by mail under regulations to be prescribed by the President.

Sec. 6. That the President is hereby authorized to utilize the service of any or all departments and any or all officers or agents of the United States and of the several States, Territories, and the District of Columbia, and subdivisions thereof, in the execution of this Act, and all officers and agents of the United States and of the several States, Territories, and subdivisions thereof, and of the District of

Columbia, and all persons designated or appointed under regulations prescribed by the President whether such appointments are made by the President himself or by the governor or other officer of any State or Territory to perform any duty in the execution of this Act, are hereby required to perform such duty as the President shall order or direct, and all such officers and agents and persons so designated or appointed shall hereby have full authority for all acts done by them in the execution of this Act by the direction of the President. Correspondence in the execution of this Act may be carried in penalty envelopes bearing the frank of the War Department. Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty; and any person charged with such duty or having and exercising any authority under said Act, regulations, or directions, who shall knowingly make or be a party to the making of any false or incorrect registration, physical examination, exemption, enlistment, enrollment, or muster; and any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this Act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this Act or of said regulations, or who, in any manner, shall fail or neglect fully to perform any duty required of him in the execution of this Act, shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by court-martial and suffer such punishment as a court-martial may direct.

Sec. 7. That the qualifications and conditions for voluntary enlistment as herein provided shall be the same as those prescribed by existing law for enlistments in the Regular Army, except that recruits must be between the ages of eighteen and forty years, both inclusive, at the time of their enlistment; and such enlistments shall be for the period of the emergency unless sooner discharged. All enlistments, including those in the Regular Army Reserve, which are in force on the date of the approval of this Act and which would terminate during the emergency shall continue in force during the emergency unless sooner discharged; but nothing herein contained shall be construed to shorten the period of any existing enlistment: Provided, That all persons enlisted or drafted under any of the provisions of this Act shall as far as practicable be grouped into units by States and the political subdivisions of the same: Provided further, That all persons who have enlisted since April first, nineteen hundred and seventeen, either in the Regular Army or in the National Guard, and all persons who have enlisted in the National Guard since June third, nineteen hundred and sixteen, upon their application, shall be discharged upon the termination of the existing emergency.

The President may provide for the discharge of any or all enlisted men whose status with respect to dependents renders such discharge advisable; and he may also authorize the employment on any active

duty of retired enlisted men of the Regular Army, either with their rank on the retired list or in higher enlisted grades, and such retired enlisted men shall receive the full pay and allowances of the grades in which they are actively employed.

Sec. 8. That the President, by and with the advice and consent of the Senate, is authorized to appoint for the period of the existing emergency such general officers of appropriate grades as may be necessary for duty with brigades, divisions, and higher units in which the forces provided for herein may be organized by the President, and general officers of appropriate grade for the several Coast Artillery districts. In so far as such appointments may be made from any of the forces herein provided for, the appointees may be selected irrespective of the grades held by them in such forces. Vacancies in all grades in the Regular Army resulting from the appointment of officers thereof to higher grades in the forces other than the Regular Army herein provided for shall be filled by temporary promotions and appointments in the manner prescribed for filling temporary vacancies by section one hundred and fourteen of the national defense Act approved June third, nineteen hundred and sixteen; and officers appointed under the provisions of this Act to higher grades in the forces other than the Regular Army herein provided for shall not vacate their permanent commissions nor be prejudiced in their relative or lineal standing in the Regular Army.

Sec. 9. That the appointments authorized and made as provided by the second, third, fourth, fifth, sixth, and seventh paragraphs of section one and by section eight of this Act and the temporary appointments in the Regular Army authorized by the first paragraph of section one of this Act, shall be for the period of the emergency, unless sooner terminated by discharge or otherwise. The President is hereby authorized to discharge any officer from the office held by him under such appointment for any cause which, in the judgment of the President, would promote the public service; and the general commanding any division and higher tactical organization or territorial department is authorized to appoint from time to time military boards of not less than three nor more than five officers of the forces herein provided for to examine into and report upon the capacity, qualification, conduct, and efficiency of any commissioned officer within his command other than officers of the Regular Army holding permanent or provisional commissions therein. Each member of such board shall be superior in rank to the officer whose qualifications are to be inquired into, and if the report of such board be adverse to the continuance of any such officer and be approved by the President, such officer shall be discharged from the service at the discretion of the President with one month's pay and allowances.

Sec. 10. That all officers and enlisted men of the forces herein provided for other than the Regular Army shall be in all respects on the same footing as to pay, allowances, and pensions as officers and enlisted men of corresponding grades and length of service in the Regular Army; and commencing June one, nineteen hundred and seventeen, and continuing until the termination of the emergency, all enlisted men of the Army of the United States in active service whose

base pay does not exceed \$21 per month shall receive an increase of \$15 per month; those whose base pay is \$24, an increase of \$12 per month; those whose base pay is \$30, \$36, or \$40, an increase of \$8 per month; and those whose base pay is \$45 or more, an increase of \$6 per month: Provided, That the increases of pay herein authorized shall not enter into the computation of the continuous-service pay.

Sec. 11. That all existing restrictions upon the detail, detachment, and employment of officers and enlisted men of the Regular Army are hereby suspended for the period of the present emergency.

Sec. 12. That the President of the United States, as Commander in Chief of the Army, is authorized to make such regulations governing the prohibition of alcoholic liquors in or near military camps and to the officers and enlisted men of the Army as he may from time to time deem necessary or advisable: Provided, That no person, corporation, partnership, or association shall sell, supply, or have in his or its possession any intoxicating or spirituous liquors at any military station, cantonment, camp, fort, post, officers' or enlisted men's club, which is being used at the time for military purposes under this Act, but the Secretary of War may make regulations permitting the sale and use of intoxicating liquors for medicinal purposes. It shall be unlawful to sell any intoxicating liquor, including beer, ale, or wine, to any officer or member of the military forces while in uniform, except as herein provided. Any person, corporation, partnership, or association violating the provisions of this section or the regulations made thereunder shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than \$1,000 or imprisonment for not more than twelve months, or both.

Sec. 13. That the Secretary of War is hereby authorized, empowered, and directed during the present war to do everything by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, brothels, or bawdy houses within such distance as he may deem needful of any military camp, station, fort, post, cantonment, training, or mobilization place, and any person, corporation, partnership, or association receiving or permitting to be received for immoral purposes any person into any place, structure, or building used for the purpose of lewdness, assignation, or prostitution within such distance of said places as may be designated, or shall permit any such person to remain for immoral purposes in any such place, structure, or building as aforesaid, or who shall violate any order, rule, or regulation issued to carry out the object and purpose of this section shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than \$1,000, or imprisonment for not more than twelve months, or both.

Sec. 14. That all laws and parts of laws in conflict with the provisions of this Act are hereby suspended during the period of this emergency.

Approved, May 18, 1917.

[Public—No. 137—65th Congress. H. R. 9902.]

An Act to amend section eight of an Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen. [April 20, 1918.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the last sentence of section eight of an Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen, be, and the same hereby is, amended to read as follows:

"Vacancies in the grades of the Regular Army resulting from the appointment of officers thereof to higher grades in the forces other than the Regular Army herein provided for shall be filled by temporary promotions and appointments in the manner prescribed by section one hundred and fourteen of the national defense Act, approved June third, nineteen hundred and sixteen, except that such promotions and appointments may be made by the President alone when such vacancies are in grades not above that of colonel; and officers appointed under the provisions of this Act to higher grades in the forces other than the Regular Army herein provided for shall not vacate their permanent commissions or be prejudiced in their relative or lineal standing in the Regular Army.

Approved, April 20, 1918.

[Public Resolution—No. 29—65th Congress. S. J. Res. 123.]

Joint Resolution Providing for the calling into military service of certain classes of persons registered and liable for military service under the terms of the Act of Congress approved May eighteenth, nineteen hundred and seventeen, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States." [May 16, 1918.]

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That if under any regulations heretofore or hereafter prescribed by the President persons registered and liable for military service under the terms of the Act of Congress approved May eighteenth, nineteen hundred and seventeen, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," are placed in classes for the purpose of determining their relative liability for military service, no provision of said Act shall prevent the President from calling for immediate military service under regulations heretofore or hereafter prescribed by the President all or part of the persons in any class or classes except those exempt from draft under the provisions of said Act, in proportion to the total number of persons placed in such class or classes in the various subdivisions of the States, Territories, and the District of Columbia designated by the President under the terms

of said Act; or from calling into immediate military service persons classed as skilled experts in industry or agriculture, however classified or wherever residing.

Approved, May 16, 1918.

[Public Resolution—No. 30—65th Congress. S. J. Res. 124.]

Joint Resolution Providing for the registration for military service of all male persons citizens of the United States and all male persons residing in the United States who have since the fifth day of June, nineteen hundred and seventeen, and on or before the day set for the registration by proclamation by the President, attained the age of twenty-one years, in accordance with such rules and regulations as the President may prescribe under the terms of the Act approved May eighteenth, nineteen hundred and seventeen, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States." [May 20, 1918.]

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That during the present emergency all male persons, citizens of the United States and all male persons residing in the United States, who have, since the fifth day of June, nineteen hundred and seventeen, and on or before the day set for the registration by proclamation by the President, attained the age of twenty-one years, shall be subject to registration in accordance with regulations to be prescribed by the President, and that upon proclamation by the President, stating the time and place of such registration, it shall be the duty of all such persons, except such persons as are exempt from registration under the Act of May eighteenth, nineteen hundred and seventeen, and any Act or Acts amendatory thereof, to present themselves for and submit to registration under the provisions of said Act approved May eighteenth, nineteen hundred and seventeen, and they shall be registered in the same manner and subject to the same requirements and liabilities as those previously registered under the terms of said Act: Provided, That those persons registered under the provisions of this Act shall be placed at the bottom of the list of those liable for military service, in the several classes to which they are assigned, under such rules and regulations as the President may prescribe.

Sec. 2. That after the day set under section one hereof for the registration by proclamation by the President at such intervals as the President may from time to time prescribe, the President may require that all male persons, citizens of the United States and all male persons residing in the United States, who have attained the age of twenty-one years since the last preceding date of registration, and on or before the next day set for the registration by proclamation by the President, except such persons as are exempt from registration under the Act of May eighteenth, nineteen hundred and seventeen, and any Act or Acts amendatory thereof, shall be registered in the same manner and subject to the same requirements and liabilities as those previously registered under the terms of said Act: Provided, That students who

are preparing for the ministry in recognized theological or divinity schools, and students who are preparing for the practice of medicine and surgery in recognized medical schools, at the time of the approval of this Act shall be exempt from the selective draft prescribed in the Act of May eighteenth, nineteen hundred and seventeen.

Sec. 3. That all such persons when registered shall be liable to military service and to draft under the terms of said Act approved May eighteenth, nineteen hundred and seventeen, under such regulations as the President may prescribe not inconsistent with the terms of said Act.

Sec. 4. That all such persons shall be subject to the terms and provisions and liabilities of said Act approved May eighteenth, nineteen hundred and seventeen, in all respects as if they had been registered under the terms of said Act, and every such person shall be deemed to have notice of the requirements of said Act and of this joint resolution upon the publication of any such proclamation by the President.

Approved, May 20, 1918.

[Public—No. 193—65th Congress.]

Army Appropriations Act. [See post, No. 21.]

[Ch. XI. Method of Determining Quotas.]

[Ch. XII. Registration and Drafting of Allens.]

[Ch. XXI. Increase of Drafted Army.]

[Public—No. 210—65th Congress. H. R. 12731.]

An Act Amending the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen. [August 31, 1918.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the second sentence of section two of the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen, as amended, be, and is hereby, amended to read as follows:

Such draft as herein provided shall be based upon liability to military service of all male citizens and male persons residing in the United States, not alien enemies, who have declared their intention to become citizens, between the ages of eighteen and forty-five, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act: Provided, That the President may draft such persons liable to military service in such sequence of ages and at such time or times as he may prescribe: Provided further, That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which

shall operate and be held to cancel his declaration of intention to become an American citizen, and he shall forever be debarred from becoming a citizen of the United States.

Sec. 2. That the provision wherever occurring in section four of said Act, "persons engaged in industries, including agriculture, found to be necessary to the maintenance of the Military Establishment or the effective operation of the military forces or the maintenance of national interest during the emergency," be, and is hereby, amended to read as follows:

Persons engaged in industries, occupations, or employments, including agriculture, found to be necessary to the maintenance of the Military Establishment or the effective operation of the military forces or the maintenance of national interest during the emergency.

Sec. 3. That section five of said Act be, and is hereby, amended to read as follows:

That all male persons between the ages of eighteen and forty-five, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President, and, upon proclamation by the President or other public notice given by him or by his direction stating the time or times and place or places of any such registration, it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army; officers and enlisted men of the National Guard while in the service of the United States; officers of the Officers' Reserve Corps and enlisted men in the Enlisted Reserve Corps while in the service of the United States; officers and enlisted men of the Navy and Marine Corps; officers and enlisted and enrolled men of the Naval Reserve Force and Marine Corps Reserve while in the service of the United States; officers commissioned in the Army of the United States under the provisions of this Act; persons who, prior to any day set for registration by the President hereunder, have registered under the terms of this Act or under the terms of the resolution entitled "Joint resolution providing for the registration for military service of all male persons citizens of the United States and all male persons residing in the United States who have, since the fifth day of June, nineteen hundred and seventeen, and on or before the day set for the registration by proclamation by the President, attained the age of twenty-one years, in accordance with such rules and regulations as the President may prescribe under the terms of the Act approved May eighteenth, nineteen hundred and seventeen, entitled 'An Act to authorize the President to increase temporarily the Military Establishment of the United States,' " approved May twentieth, nineteen hundred and eighteen, whether called for service or not, and diplomatic representatives, technical attachés of foreign embassies and legations, consuls general, consuls, vice consuls, and consular agents of foreign countries, residing in the United States, who are not citizens of the United States to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act upon the publication of any such proclamation or any such other public notice as aforesaid given by the President or by his direction; and any person who shall willfully fail or refuse to present himself for

registration or to submit thereto as herein provided shall be guilty of a misdemeanor and shall, upon conviction in a district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year and shall thereupon be duly registered: Provided, That in the call of the docket precedence shall be given in courts trying the same, to the trial of criminal proceedings under this Act: Provided further, That persons shall be subject to registration as herein provided who shall have attained their eighteenth birthday and who shall not have attained their forty-sixth birthday on or before the day set for the registration in any such proclamation by the President or any such other public notice given by him or by his direction, and all persons so registered shall be and remain subject to draft into the forces hereby authorized unless exempted or excused therefrom as in this Act provided: Provided further, That the President may at such intervals as he may desire from time to time require all male persons who have attained the age of eighteen years since the last preceding date of registration and on or before the next date set for registration by proclamation by the President, except such persons as are exempt from registration hereunder, to register in the same manner and subject to the same requirements and liabilities as those previously registered under the terms hereof: And provided further, That in the case of temporary absence from actual place of legal residence of any person liable to registration as provided herein, such registration may be made by mail under regulations to be prescribed by the President: And provided further, That men registered under the provisions of this Act who have served in the Navy of the United States shall, upon their own application, be permitted to reenlist in the naval or marine service of the United States with and by the approval of the Secretary of the Navy.

Sec. 4. That all men rendered available for induction into the military service of the United States through registration or draft heretofore or hereafter made pursuant to law, shall be liable to service in the Army or the Navy or the Marine Corps, and shall be allotted to the Army, the Navy, and the Marine Corps under regulations to be prescribed by the President: Provided, That all persons drafted and allotted to the Navy or the Marine Corps in pursuance hereof shall, from the date of allotment, be subject to the laws and regulations governing the Navy and the Marine Corps, respectively.

Sec. 5. That the wife of a soldier or sailor serving in the present war shall not be disqualified for any position or appointment under the Government because she is a married woman.

Sec. 6. That soldiers, during the present emergency, regardless of age and existing law and regulations, shall be eligible to receive commissions in the Army of the United States. They shall likewise be eligible to admission to officers' schools under such rules and regulations as may be adopted for entrance to such schools, but shall not be barred therefrom or discriminated against on account of age.

Sec. 7. That the Secretary of War is authorized to assign to educational institutions, for special and technical training, soldiers who enter the military service under the provisions of this Act in such numbers and under such regulations as he may prescribe; and is au-

thorized to contract with such educational institutions for the subsistence, quarters, and military and academic instruction of such soldiers.

Sec. 8. That any person, under the age of twenty-one, who has served or shall hereafter serve in the Army of the United States during the present emergency, shall be entitled to the same rights under the homestead and other land and mineral entry laws, general or special, as those over twenty-one years of age now possess under said laws: Provided, That any requirements as to establishment of residence within a limited time shall be suspended as to entry by such person until six months after his discharge from military service: Provided further, That applications for entry may be verified before any officer in the United States, or any foreign country, authorized to administer oaths by the laws of the State or Territory in which the land may be situated.

Sec. 9. That hereafter, uniforms, accouterments, and equipment shall, upon the request of any officer of the Army or cadet at the Military Academy, be furnished by the Government at cost, subject to such restrictions and regulations as the Secretary of War may prescribe.

Approved, August 31, 1918.

British and Canadian Conventions

PART I.

CONVENTION RELATING TO THE SERVICE OF CITIZENS OF THE UNITED STATES IN GREAT BRITAIN AND OF BRITISH SUBJECTS IN THE UNITED STATES.

The President of the United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, being convinced that for the better prosecution of the present war it is desirable that citizens of the United States in Great Britain and British subjects in the United States shall either return to their own country to perform military service in its Army or shall serve in the Army of the country in which they remain, have resolved to enter into a convention to that end, and have accordingly appointed as their plenipotentiaries, the President of the United States of America, Robert Lansing, Secretary of State of the United States; and His Britannic Majesty, the Earl of Reading, Lord Chief Justice of England, High Commissioner and Ambassador Extraordinary and Plenipotentiary on Special Mission to the United States, who, after having communicated to each other their respective full powers, found to be in proper form, have agreed upon and concluded the following articles:

ARTICLE I.

All male citizens of the United States in Great Britain and all male British subjects in the United States, shall, unless before the time limited by this convention they enlist or enroll in the forces of their own country or return to the United States or Great Britain, respectively, for the purpose of military service, be subject to military serv-

ice and entitled to exemption or discharge therefrom under the laws and regulations from time to time in force of the country in which they are: Provided, That in respect to British subjects in the United States the ages for military service shall be for the time being 20 to 44 years, both inclusive: Provided, however, That no citizen of the United States in Great Britain and no British subject in the United States who, before proceeding to Great Britain or the United States, respectively, was ordinarily resident in a place in the possessions of the United States or in His Majesty's dominions, respectively, where the law does not impose compulsory military service shall, by virtue of this convention, be liable to military service under the laws and regulations of Great Britain or the United States, respectively: Provided, further, That in the event of compulsory military service being applied to any part of His Majesty's dominions in which military service at present is not compulsory, British subjects who before proceeding to the United States were ordinarily resident in such part of His Majesty's dominions, shall thereupon be included within the terms of this convention.

ARTICLE II.

Citizens of the United States and British subjects within the age limits aforesaid who desire to enter the military service of their own country must, after making such application therefor as may be prescribed by the laws or regulations of the country in which they are, enlist or enroll or must leave Great Britain or the United States, as the case may be, for the purpose of military service in their own country before the expiration of 60 days after the date of the exchange of ratifications of this convention, if liable to military service in the country in which they are at the said date; or if not so liable, then before the expiration of 30 days after the time when liability shall accrue; or as to those holding certificates of exemption under Article III of this convention, before the expiration of 30 days after the date on which any such certificate becomes inoperative unless sooner renewed; or as to those who apply for certificates of exemption under Article III and whose applications are refused, then before the expiration of 30 days after the date of such refusal, unless the application be sooner granted.

ARTICLE III.

The Government of the United States and His Britannic Majesty's Government may through their respective diplomatic representatives issue certificates of exemption from military service to citizens of the United States in Great Britain and British subjects in the United States, respectively, upon application or otherwise, within 60 days from the date of the exchange of ratifications of this convention, or within 30 days from the date when such citizens or subjects become liable to military service in accordance with Article I, provided that the applications be made or the certificates be granted prior to their entry into the military service of either country.

Such certificates may be special or general, temporary or conditional, and may be modified, renewed, or revoked in the discretion of the Government granting them. Persons holding such certificates

shall, so long as the certificates are in force, not be liable to military service in the country in which they are.

ARTICLE IV.

This convention shall not apply to British subjects in the United States (a) who were born or naturalized in Canada, and who, before proceeding to the United States, were ordinarily resident in Great Britain or Canada or in any other part of His Majesty's Dominions to which compulsory military service has been or may be hereafter by law applied, or outside the British Dominions; or (b) who were not born or naturalized in Canada, but who before proceeding to the United States were ordinarily resident in Canada.

ARTICLE V.

The Government of the United States and His Britannic Majesty's Government will, respectively, so far as possible facilitate the return of British subjects and citizens of the United States who may desire to return to their own country for military service, but shall not be responsible for providing transport or the cost of transport for such persons.

ARTICLE VI.

No citizen or subject of either country who, under the provisions of this convention, enters the military service of the other shall, by reason of such service, be considered after this convention shall have expired or after his discharge to have lost his nationality or to be under any allegiance to His Britannic Majesty or to the United States, as the case may be.

ARTICLE VII.

The present convention shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate of the United States, and by His Britannic Majesty, and the ratifications shall be exchanged at Washington or at London as soon as possible. It shall come into operation on the date on which the ratifications are exchanged and shall remain in force until the expiration of 60 days after either of the contracting parties shall have given notice of termination to the other; whereupon any subject or citizen of either country incorporated into the military service of the other under this convention shall be as soon as possible discharged therefrom.

In witness whereof the respective plenipotentiaries have signed the present convention and have affixed thereto their seals.

Done in duplicate at Washington the 3d day of June, in the year of our Lord one thousand nine hundred and eighteen.

Robert Lansing. [Seal.]
Reading. [Seal.]

PART II.

CONVENTION RELATING TO THE SERVICE OF CITIZENS OF THE UNITED STATES IN CANADA AND OF CANADIANS IN THE UNITED STATES.

The President of the United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland, and

of the British Dominions Beyond the Seas, Emperor of India, being convinced that for the better prosecution of the present war it is desirable that citizens of the United States in Canada and Canadian British subjects in the United States shall either return to their own country to perform military service in its Army or shall serve in the Army of the country in which they remain, have resolved to enter into a convention to that end and have accordingly appointed as their plenipotentiaries the President of the United States of America, Robert Lansing, Secretary of State of the United States, and His Britannic Majesty, the Earl of Reading, Lord Chief Justice of England, high commissioner and ambassador extraordinary and plenipotentiary on special mission to the United States, who, after having communicated to each other their respective full powers found to be in proper form, have agreed upon and concluded the following articles:

ARTICLE I.

All male citizens of the United States in Canada (hereinafter called Americans) and all male British subjects in the United States (a) who were born or naturalized in Canada, and who, before proceeding to the United States were ordinarily resident in Great Britain or Canada or in any other part of His Majesty's Dominions to which compulsory military service has been or may be hereafter by law applied, or outside the British Dominions; or (b) who were not born or naturalized in Canada, but who, before proceeding to the United States, were ordinarily resident in Canada (hereinafter called Canadians), shall, unless before the time limited by this convention they enlist or enroll in the forces of their own country or return to the United States or Canada, respectively, for the purpose of military service, be subject to military service and entitled to exemption or discharge therefrom under the laws and regulations, from time to time in force, of the country in which they are: Provided, That in respect to Americans, in Canada, the ages for military service shall be the ages specified in the laws of the United States prescribing compulsory military service, and in respect to Canadians in the United States the ages for military service shall be for the time being 20 to 44 years, both inclusive.

ARTICLE II.

Americans and Canadians within the age limits aforesaid who desire to enter the military service of their own country must enlist or enroll or must leave Canada or the United States, as the case may be, for the purpose of military service in their own country before the expiration of 60 days after the date of the exchange of ratifications of this convention, if liable to military service in the country in which they are at the said date; or if not so liable, then before the expiration of 30 days after the time when liability shall accrue; or, as to those holding certificates of exemption under Article III of this convention, before the expiration of 30 days after the date on which any such certificate becomes inoperative unless sooner renewed; or as to those who apply for certificates of exemption under Article III, and

whose applications are refused, then before the expiration of 30 days after the date of such refusal, unless the application be sooner granted.

ARTICLE III.

The Government of the United States, through the consul general at Ottawa, and His Britannic Majesty's Government through the British ambassador at Washington, may issue certificates of exemption from military service to Americans and Canadians, respectively, upon application or otherwise, within 60 days from the date of the exchange of ratifications of this convention or within 30 days from the date when such citizens or subjects become liable to military service in accordance with Article I, provided that the applications be made or the certificates be granted prior to their entry into the military service of either country. Such certificates may be special or general, temporary or conditional, and may be modified, renewed, or revoked in the discretion of the Government granting them. Persons holding such certificates shall, so long as the certificates are in force, not be liable to military service in the country in which they are.

ARTICLE IV.

The Government of the United States and the Government of Canada will, respectively, so far as possible facilitate the return of Canadians and Americans who may desire to return to their own country for military service, but shall not be responsible for providing transport or the cost of transport for such persons.

ARTICLE V.

No citizen or subject of either country who, under the provisions of this convention, enters the military service of the other shall, by reason of such service, be considered, after this convention shall have expired or after his discharge, to have lost his nationality or to be under any allegiance to the United States or to His Britannic Majesty, as the case may be.

ARTICLE VI.

The present convention shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate of the United States, and by His Britannic Majesty, and the ratifications shall be exchanged at Washington or at London as soon as possible. It shall come into operation on the date on which the ratifications are exchanged and shall remain in force until the expiration of 60 days after either of the contracting parties shall have given notice of termination to the other; whereupon any citizen or subject of either country incorporated into the military service of the other under this convention shall be as soon as possible discharged therefrom.

In witness whereof the respective plenipotentiaries have signed the present convention and have affixed thereto their seals.

Done in duplicate at Washington the third day of June, in the year of our Lord nineteen hundred and eighteen.

Robert Lansing. [Seal.]
Reading. [Seal.]

RECESS.

NOTES RELATING TO ARTICLE I.

British Embassy, Washington, June 3, 1918.

Hon. Robert Lansing,

Secretary of State of the United States.

Sir: With reference to the military-service convention between the United States and Great Britain signed to-day, I am instructed by His Majesty's Government to explain why the proviso to Article I does not limit the military service of citizens of the United States in Great Britain to those of the ages specified in the laws of the United States prescribing compulsory military service, as requested by the United States Government. The reason for the omission of this clause in the proviso is a desire to avoid the delay that would be involved in modifying the military service acts, 1916 to 1918, which control the operation of any convention of this character. I beg you, therefore, to be good enough not to press this proposal.

The effect of these acts is to make United States citizens in Great Britain under this convention liable to military service between the ages of 18 and 49, both inclusive. The limitation of the ages of United States citizens in Great Britain for the purpose of military service to those prescribed in the laws of the United States relating to compulsory military service may, however, be attained without amendment of these acts by exercise of the United States of its right of exemption under Article III.

His Majesty's Government understands therefore, that the United States Government will exercise their right under Article III to exempt from compulsory military service in Great Britain all citizens of the United States in Great Britain outside the ages specified in the laws of the United States prescribing compulsory military service.

I have the honor to be, with the highest consideration, sir,

Your most obedient, humble servant,

Reading.

June 3, 1918.

His Excellency the Earl of Reading,

Ambassador of Great Britain on Special Mission:

I have the honor to acknowledge the receipt of Your Excellency's note of this date in regard to the military service convention between the United States and Great Britain, signed to-day, in which you state that you are instructed to explain why the proviso to Article I does not limit the military service of citizens of the United States in Great Britain to those of the ages specified in the laws of the United States prescribing compulsory military service as requested by the United States Government. In explanation Your Excellency states as follows:

The reason for the omission of this clause in the proviso is a desire to avoid the delay which would be involved in modifying the military service acts, 1916 to 1918, which control the operation of any convention of this character. I beg you, therefore, to be good enough not to press this proposal.

The effect of these acts is to make United States citizens in Great Britain under this convention liable to military service between the ages of 18 and 49 years, both inclusive. The limitation of the ages of

United States citizens in Great Britain for the purposes of military service to those prescribed in the laws of the United States relating to compulsory military service may, however, be attained without amendment of these acts by the exercise by the United States of its right of exemption under Article III.

Your excellency adds that—

His Majesty's Government understands, therefore, that the United States Government will exercise its right under Article III to exempt from compulsory military service in Great Britain all citizens of the United States in Great Britain outside the ages specified in the laws of the United States prescribing compulsory military service.

In reply I have the honor to inform your excellency that the Government of the United States is pleased to accept this explanation of said Article I, and, in lieu of a clause in this article limiting the military service of citizens of the United States in Great Britain to those of the ages specified in the laws of the United States prescribing compulsory military service, to exercise its right under Article III to exempt from compulsory military service in Great Britain all citizens of the United States in Great Britain outside of the ages specified in the laws of the United States prescribing compulsory military service.

I have the honor to be, with the highest consideration,

Your excellency's most obedient servant,

Robert Lansing.

Upon exchange of ratifications a certificate signed by the President in the following form will be issued exempting from military service citizens of the United States in Great Britain outside of the ages specified from time to time by the laws of the United States prescribing compulsory military service for citizens of the United States. In accordance with such certificate and the provisions of Article III of the convention in respect of citizens of the United States in Great Britain certificates of exemption will be issued to citizens of the United States in Great Britain outside the ages specified in the laws of the United States prescribing from time to time compulsory military service for citizens of the United States.

GENERAL CERTIFICATE.

Whereas the convention concluded on June 3, 1918, between the Government of the United States and the Government of Great Britain in respect to compulsory military service of the citizens or subjects of either party in the territories of the other, provides in Article III that:

The Government of the United States and His Britannic Majesty's Government may, through their respective diplomatic representatives, issue certificates of exemption from military service to citizens of the United States in Great Britain and British subjects in the United States, respectively, upon application or otherwise, within 60 days from the date of the exchange of ratifications of this convention, or within 30 days from the date when such citizens or subjects become liable to military service in accordance with Article I, provided that the

applications be made or the certificates be granted prior to their entry into the military service of either country.

Such certificates may be special or general, temporary or conditional, and may be modified, renewed, or revoked in the discretion of the Government granting them. Persons holding such certificates shall, so long as the certificates are in force, not be liable to military service in the country in which they are.

And whereas, by an exchange of notes dated June 3, 1918, between the parties of said convention in relation to Article I thereof, it is understood that the Government of the United States will exercise its right under Article III to exempt from compulsory military service in Great Britain all citizens of the United States in Great Britain outside of the ages specified in the laws of the United States prescribing compulsory military service for citizens of the United States.

Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of authority of Article III of said convention, hereby certify, in the name of the Government of the United States, that all citizens of the United States in Great Britain outside the ages specified from time to time in the laws of the United States prescribing compulsory military service for citizens of the United States are and shall be exempt from compulsory military service in Great Britain.

7. CAR SERVICE ACT

[Public—No. 19—65th Congress. H. R. 328.]

An Act to amend an Act entitled "An Act to regulate commerce," as amended, in respect of car service, and for other purposes. [May 29, 1917.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of the Act entitled "An Act to regulate commerce," approved February twenty-fourth, eighteen hundred and eighty-seven, as heretofore amended, is further amended by adding thereto the following:

The term "car service" as used in this Act shall include the movement, distribution, exchange, interchange, and return of cars used in the transportation of property by any carrier subject to the provisions of this Act.

It shall be the duty of every such carrier to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service, and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

The Interstate Commerce Commission is hereby authorized by general or special orders to require all carriers subject to the provisions of the Act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the commission may, in its discretion, direct that the said rules and regulations shall be in-

corporated in their schedules showing rates, fares, and charges for transportation and be subject to any or all of the provisions of the Act relating thereto.

The commission shall, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service, including the classification of cars, compensation to be paid for the use of any car not owned by any such common carrier and the penalties or other sanctions for nonobservance of such rules.

Whenever the commission shall be of opinion that necessity exists for immediate action with respect to the supply or use of cars for transportation of property, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine, to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the commission, and also authority to make such just and reasonable directions with respect to car service during such time as in its opinion will best promote car service in the interest of the public and the commerce of the people.

The directions of the commission as to car service may be made through and by such agents or agencies as the commission shall designate and appoint for that purpose.

In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with any direction or order with respect to car service, such carrier, receiver, or trustee shall be liable to a penalty of not less than \$100 nor more than \$500 for each such offense and \$50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

Approved, May 29, 1917.

8. EMERGENCY SHIPPING FUND ACT

(Urgent Deficiencies Act)

[Public—No. 23—65th Congress. H. R. 3071.]

An Act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes. [June 15, 1917.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That * * *

The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature,

kind and quantity usually produced or capable of being produced by such person.

(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material.

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: Provided, That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or

hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct.

The word "person" as used herein, shall include any individual, trustee, firm, association, company, corporation, or contractor.

The word "ship" shall include any boat, vessel, or submarine and the parts thereof.

The word "material" shall include stores, supplies, and equipment for ships, and everything required for or in connection with the production thereof.

The word "plant" shall include any factory, workshop, warehouse, engine works; buildings used for manufacture, assembling, construction, or any process; any shipyard or dockyard and discharging terminal or other facilities connected therewith.

The words "United States" shall include all lands and waters subject to the jurisdiction of the United States of America.

All authority granted to the President herein, or by him delegated, shall cease six months after a final treaty of peace is proclaimed between this Government and the German Empire.

9. ESPIONAGE ACT

[Public—No. 24—65th Congress. H. R. 291.]

An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes. [June 15, 1917.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

TITLE I.

ESPIONAGE.

Section 1. That (a) whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, owned or constructed or in progress of construction by the United States or under the control of the United States or of any of its officers or agents, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored, under any contract or agreement with the United States, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place within the meaning of section six of this title; or (b) whoever for the purpose

aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or (c) whoever, for the purpose aforesaid, receives or obtains or agrees or attempts or induces or aids another to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts or induces or aids another to receive or obtain it, that it has been or will be obtained, taken, made or disposed of by any person contrary to the provisions of this title; or (d) whoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or (e) whoever, being intrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note or information, relating to the national defense, through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, shall be punished by a fine of not more than \$10,000, or by imprisonment for not more than two years, or both.

Sec. 2. (a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense shall be punished by imprisonment for not more than twenty years: Provided, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years; and (b) whoever, in time of war, with intent that the same shall be communicated to the enemy, shall collect, record, publish, or communicate, or attempt to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or

measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for not more than thirty years.

Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.

Sec. 4. If two or more persons conspire to violate the provisions of sections two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the Act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine.

Sec. 5. Whoever harbors or conceals any person who he knows, or has reasonable grounds to believe or suspect, has committed, or is about to commit, an offense under this title shall be punished by a fine of not more than \$10,000 or by imprisonment for not more than two years, or both.

Sec. 6. The President in time of war or in case of national emergency may by proclamation designate any place other than those set forth in subsection (a) of section one hereof in which anything for the use of the Army or Navy is being prepared or constructed or stored as a prohibited place for the purposes of this title: Provided, That he shall determine that information with respect thereto would be prejudicial to the national defense.

Sec. 7. Nothing contained in this title shall be deemed to limit the jurisdiction of the general courts-martial, military commissions, or naval courts-martial under sections thirteen hundred and forty-two, thirteen hundred and forty-three, and sixteen hundred and twenty-four of the Revised Statutes as amended.

Sec. 8. The provisions of this title shall extend to all Territories, possessions, and places subject to the jurisdiction of the United States whether or not contiguous thereto, and offenses under this title when committed upon the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States and outside the territorial limits thereof shall be punishable hereunder.

Sec. 9. The Act entitled "An Act to prevent the disclosure of national defense secrets," approved March third, nineteen hundred and eleven, is hereby repealed.

TITLE II.

VESSELS IN PORTS OF THE UNITED STATES.

Section 1. Whenever the President by proclamation or Executive order declares a national emergency to exist by reason of actual or threatened war, insurrection, or invasion, or disturbance or threatened disturbance of the international relations of the United States, the Secretary of the Treasury may make, subject to the approval of the President, rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, may inspect such vessel at any time, place guards thereon, and, if necessary in his opinion in order to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of the rights and obligations of the United States, may take, by and with the consent of the President, for such purposes, full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by him to go or remain on board thereof.

Within the territory and waters of the Canal Zone the Governor of the Panama Canal, with the approval of the President, shall exercise all the powers conferred by this section on the Secretary of the Treasury.

Sec. 2. If any owner, agent, master, officer, or person in charge, or any member of the crew of any such vessel fails to comply with any regulation or rule issued or order given by the Secretary of the Treasury or the Governor of the Panama Canal under the provisions of this title, or obstructs or interferes with the exercise of any power conferred by this title, the vessel, together with her tackle, apparel, furniture, and equipment, shall be subject to seizure and forfeiture to the United States in the same manner as merchandise is forfeited for violation of the customs revenue laws; and the person guilty of such failure, obstruction, or interference shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

Sec. 3. It shall be unlawful for the owner or master or any other person in charge or command of any private vessel, foreign or domestic, or for any member of the crew or other person, within the territorial waters of the United States, willfully to cause or permit the destruction or injury of such vessel or knowingly to permit said vessel to be used as a place of resort for any person conspiring with another or preparing to commit any offense against the United States, or in violation of the treaties of the United States or of the obligations of the United States under the law of nations, or to defraud the United States, or knowingly to permit such vessels to be used in violation of the rights and obligations of the United States under the law of nations; and in case such vessel shall be so used, with the knowledge of the owner or master or other person in charge or command thereof, the vessel, together with her tackle, apparel, furniture, and equipment, shall be subject to seizure and forfeiture to the United States in the same manner as merchandise is forfeited for violation of the customs reve-

nue laws; and whoever violates this section shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

Sec. 4. The President may employ such part of the land or naval forces of the United States as he may deem necessary to carry out the purpose of this title.

TITLE III.

INJURING VESSELS ENGAGED IN FOREIGN COMMERCE.

Section 1. Whoever shall set fire to any vessel of foreign registry, or any vessel of American registry entitled to engage in commerce with foreign nations, or to any vessel of the United States as defined in section three hundred and ten of the Act of March fourth, nineteen hundred and nine, entitled "An Act to codify, revise, and amend the penal laws of the United States," or to the cargo of the same, or shall tamper with the motive power or instrumentalities of navigation of such vessel, or shall place bombs or explosives in or upon such vessel, or shall do any other act to or upon such vessel while within the jurisdiction of the United States, or, if such vessel is of American registry, while she is on the high sea, with intent to injure or endanger the safety of the vessel or of her cargo or of persons on board, whether the injury or danger is so intended to take place within the jurisdiction of the United States, or after the vessel shall have departed therefrom; or whoever shall attempt or conspire to do any such acts with such intent, shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

TITLE IV.

INTERFERENCE WITH FOREIGN COMMERCE BY VIOLENT MEANS.

Section 1. Whoever, with intent to prevent, interfere with, or obstruct or attempt to prevent, interfere with, or obstruct the exportation to foreign countries of articles from the United States shall injure or destroy, by fire or explosives, such articles or the places where they may be while in such foreign commerce, shall be fined not more than \$10,000, or imprisoned not more than ten years, or both.

TITLE V.

ENFORCEMENT OF NEUTRALITY.

Section 1. During a war in which the United States is a neutral nation, the President, or any person thereunto authorized by him, may withhold clearance from or to any vessel, domestic or foreign, which is required by law to secure clearance before departing from port or from the jurisdiction of the United States, or, by service of formal notice upon the owner, master, or person in command or having charge of any domestic vessel not required by law to secure clearances before so departing, to forbid its departure from port or from the jurisdiction of the United States, whenever there is reasonable cause to believe that any such vessel, domestic or foreign, whether requiring clearance or not, is about to carry fuel, arms, ammunition, men, supplies, dispatches, or information to any warship, tender, or supply ship of a foreign belligerent nation in violation of the laws, treaties, or obligations

of the United States under the law of nations; and it shall thereupon be unlawful for such vessel to depart.

Sec. 2. During a war in which the United States is a neutral nation, the President, or any person thereunto authorized by him, may detain any armed vessel owned wholly or in part by American citizens, or any vessel, domestic or foreign (other than one which has entered the ports of the United States as a public vessel), which is manifestly built for warlike purposes or has been converted or adapted from a private vessel to one suitable for warlike use, until the owner or master, or person having charge of such vessel, shall furnish proof satisfactory to the President, or to the person duly authorized by him, that the vessel will not be employed by the said owners, or master, or person having charge thereof, to cruise against or commit or attempt to commit hostilities upon the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with which the United States is at peace, and that the said vessel will not be sold or delivered to any belligerent nation, or to an agent, officer, or citizen of such nation, by them or any of them, within the jurisdiction of the United States, or, having left that jurisdiction, upon the high seas.

Sec. 3. During a war in which the United States is a neutral nation, it shall be unlawful to send out of the jurisdiction of the United States any vessel built, armed, or equipped as a vessel of war, or converted from a private vessel into a vessel of war, with any intent or under any agreement or contract, written or oral, that such vessel shall be delivered to a belligerent nation, or to an agent, officer, or citizen of such nation, or with reasonable cause to believe that the said vessel shall or will be employed in the service of any such belligerent nation after its departure from the jurisdiction of the United States.

Sec. 4. During a war in which the United States is a neutral nation, in addition to the facts required by sections forty-one hundred and ninety-seven, forty-one hundred and ninety-eight, and forty-two hundred of the Revised Statutes to be set out in the masters' and shippers' manifests before clearance will be issued to vessels bound to foreign ports, each of which sections of the Revised Statutes is hereby declared to be and is continued in full force and effect, every master or person having charge or command of any vessel, domestic or foreign, whether requiring clearance or not, before departure of such vessel from port shall deliver to the collector of customs for the district wherein such vessel is then located a statement duly verified by oath, that the cargo or any part of the cargo is or is not to be delivered to other vessels in port or to be transshipped on the high seas and, if it is to be so delivered or transshipped, stating the kind and quantities and the value of the total quantity of each kind of article so to be delivered or transshipped, and the name of the person, corporation, vessel, or government, to whom the delivery or transshipment is to be made; and the owners, shippers, or consignors of the cargo of such vessel shall in the same manner and under the same conditions deliver to the collector like statements under oath as to the cargo or the parts thereof laden or shipped by them, respectively.

Sec. 5. Whenever it appears that the vessel is not entitled to clearance or whenever there is reasonable cause to believe that the addi-

tional statements under oath required in the foregoing section are false, the collector of customs for the district in which the vessel is located may, subject to review by the Secretary of Commerce, refuse clearance to any vessel, domestic or foreign, and by formal notice served upon the owners, master, or person or persons in command or charge of any domestic vessel for which clearance is not required by law, forbid the departure of the vessel from the port or from the jurisdiction of the United States; and it shall thereupon be unlawful for the vessel to depart.

Sec. 6. Whoever, in violation of any of the provisions of this title, shall take, or attempt or conspire to take, or authorize the taking of any such vessel, out of port or from the jurisdiction of the United States, shall be fined not more than \$10,000 or imprisoned not more than five years, or both; and, in addition, such vessel, her tackle, apparel, furniture, equipment, and her cargo shall be forfeited to the United States.

Sec. 7. Whoever, being a person belonging to the armed land or naval forces of a belligerent nation or belligerent faction of any nation and being interned in the United States, in accordance with the law of nations, shall leave or attempt to leave said jurisdiction, or shall leave or attempt to leave the limits of internment in which freedom of movement has been allowed, without permission from the proper official of the United States in charge, or shall willfully overstay a leave of absence granted by such official, shall be subject to arrest by any marshal or deputy marshal of the United States, or by the military or naval authorities thereof, and shall be returned to the place of internment and there confined and safely kept for such period of time as the official of the United States in charge shall direct; and whoever, within the jurisdiction of the United States and subject thereto, shall aid or entice any interned person to escape or attempt to escape from the jurisdiction of the United States, or from the limits of internment prescribed, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

Sec. 8. Section thirteen of the Act entitled "An Act to codify, revise, and amend the penal laws of the United States," approved March fourth, nineteen hundred and nine, is hereby amended so as to read as follows:

"Sec. 13. Whoever, within the territory or jurisdiction of the United States or of any of its possessions, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or who takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than \$3,000 or imprisoned not more than three years, or both."

Sec. 9. That the President may employ such part of the land or naval forces of the United States as he may deem necessary to carry out the purposes of this title.

Sec. 10. Section fifteen of the Act entitled "An Act to codify, revise, and amend the penal laws of the United States," approved March

fourth, nineteen hundred and nine, is hereby amended so as to read as follows:

"Sec. 15. It shall be lawful for the President to employ such part of the land or naval forces of the United States, or of the militia thereof, as he may deem necessary to compel any foreign vessel to depart from the United States or any of its possessions in all cases in which, by the law of nations or the treaties of the United States, it ought not to remain, and to detain or prevent any foreign vessel from so departing in all cases in which, by the law of nations or the treaties of the United States, it is not entitled to depart."

Sec. 11. The joint resolution approved March fourth, nineteen hundred and fifteen, "To empower the President to better enforce and maintain the neutrality of the United States," and any Act or parts of Acts in conflict with the provisions of this title are hereby repealed.

TITLE VI.

SEIZURE OF ARMS AND OTHER ARTICLES INTENDED FOR EXPORT.

Section 1. Whenever an attempt is made to export or ship from or take out of the United States, any arms or munitions of war, or other articles, in violation of law, or whenever there shall be known or probable cause to believe that any such arms or munitions of war, or other articles, are being or are intended to be exported, or shipped from, or taken out of the United States, in violation of law, the several collectors, naval officers, surveyors, inspectors of customs, and marshals, and deputy marshals of the United States, and every other person duly authorized for the purpose by the President, may seize and detain any articles or munitions of war about to be exported or shipped from, or taken out of the United States, in violation of law, and the vessels or vehicles containing the same, and retain possession thereof until released or disposed of as hereinafter directed. If upon due inquiry as hereinafter provided, the property seized shall appear to have been about to be so unlawfully exported, shipped from, or taken out of the United States, the same shall be forfeited to the United States.

Sec. 2. It shall be the duty of the person making any seizure under this title to apply, with due diligence, to the judge of the district court of the United States, or to the judge of the United States district court of the Canal Zone, or to the judge of a court of first instance in the Philippine Islands, having jurisdiction over the place within which the seizure is made, for a warrant to justify the further detention of the property so seized, which warrant shall be granted only on oath or affirmation showing that there is known or probable cause to believe that the property seized is being or is intended to be exported or shipped from or taken out of the United States in violation of law; and if the judge refuses to issue the warrant, or application therefor is not made by the person making the seizure within a reasonable time, not exceeding ten days after the seizure, the property shall forthwith be restored to the owner or person from whom seized. If the judge is satisfied that the seizure was justified under the provisions of this title and issues his warrant accordingly, then the property shall be detained by the person seizing it until the President, who is hereby expressly au-

thorized so to do, orders it to be restored to the owner or claimant, or until it is discharged in due course of law on petition of the claimant, or on trial of condemnation proceedings, as hereinafter provided.

Sec. 3. The owner or claimant of any property seized under this title may, at any time before condemnation proceedings have been instituted, as hereinafter provided, file his petition for its restoration in the district court of the United States, or the district court of the Canal Zone, or the court of first instance in the Philippine Islands, having jurisdiction over the place in which the seizure was made, whereupon the court shall advance the cause for hearing and determination with all possible dispatch, and, after causing notice to be given to the United States attorney for the district and to the person making the seizure, shall proceed to hear and decide whether the property seized shall be restored to the petitioner or forfeited to the United States.

Sec. 4. Whenever the person making any seizure under this title applies for and obtains a warrant for the detention of the property, and (a) upon the hearing and determination of the petition of the owner or claimant restoration is denied, or (b) the owner or claimant fails to file a petition for restoration within thirty days after the seizure, the United States attorney for the district wherein it was seized, upon direction of the Attorney General, shall institute libel proceedings in the United States district court or the district court of the Canal Zone or the court of first instance of the Philippine Islands having jurisdiction over the place wherein the seizure was made, against the property for condemnation; and if, after trial and hearing of the issues involved, the property is condemned, it shall be disposed of by sale, and the proceeds thereof, less the legal costs and charges, paid into the Treasury.

Sec. 5. The proceedings in such summary trials upon the petition of the owner or claimant of the property seized, as well as in the libel cases herein provided for, shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in such libel cases, and all such proceedings shall be at the suit of and in the name of the United States: Provided, That upon the payment of the costs and legal expenses of both the summary trials and the libel proceedings herein provided for, and the execution and delivery of a good and sufficient bond in an amount double the value of the property seized, conditioned that it will not be exported or used or employed contrary to the provisions of this title, the court, in its discretion, may direct that it be delivered to the owners thereof or to the claimants thereof.

Sec. 6. Except in those cases in which the exportation of arms and munitions of war or other articles is forbidden by proclamation or otherwise by the President, as provided in section one of this title, nothing herein contained shall be construed to extend to, or interfere with any trade in such commodities, conducted with any foreign port or place wheresoever, or with any other trade, which might have been lawfully carried on before the passage of this title, under the law of nations, or under the treaties or conventions entered into by the United States, or under the laws thereof.

Sec. 7. Upon payment of the costs and legal expenses incurred in any such summary trial for possession or libel proceedings, the Presi-

dent is hereby authorized, in his discretion, to order the release and restoration to the owner or claimant, as the case may be, of any property seized or condemned under the provisions of this title.

Sec. 8. The President may employ such part of the land or naval forces of the United States as he may deem necessary to carry out the purposes of this title.

TITLE VII.

CERTAIN EXPORTS IN TIME OF WAR UNLAWFUL.

Section 1. Whenever during the present war the President shall find that the public safety shall so require, and shall make proclamation thereof, it shall be unlawful to export from or ship from or take out of the United States to any country named in such proclamation any article or articles mentioned in such proclamation, except at such time or times, and under such regulations and orders, and subject to such limitations and exceptions as the President shall prescribe, until otherwise ordered by the President or by Congress: Provided, however, That no preference shall be given to the ports of one State over those of another.

Sec. 2. Any person who shall export, ship, or take out, or deliver or attempt to deliver for export, shipment, or taking out, any article in violation of this title, or of any regulation or order made hereunder, shall be fined not more than \$10,000, or, if a natural person, imprisoned for not more than two years, or both; and any article so delivered or exported, shipped, or taken out, or so attempted to be delivered or exported, shipped, or taken out, shall be seized and forfeited to the United States; and any officer, director, or agent of a corporation who participates in any such violation shall be liable to like fine or imprisonment, or both.

Sec. 3. Whenever there is reasonable cause to believe that any vessel, domestic or foreign, is about to carry out of the United States any article or articles in violation of the provisions of this title, the collector of customs for the district in which such vessel is located is hereby authorized and empowered, subject to review by the Secretary of Commerce, to refuse clearance to any such vessel, domestic or foreign, for which clearance is required by law, and by formal notice served upon the owners, master, or person or persons in command or charge of any domestic vessel for which clearance is not required by law, to forbid the departure of such vessel from the port, and it shall thereupon be unlawful for such vessel to depart. Whoever, in violation of any of the provisions of this section shall take, or attempt to take, or authorize the taking of any such vessel, out of port or from the jurisdiction of the United States, shall be fined not more than \$10,000 or imprisoned not more than two years, or both; and, in addition, such vessel, her tackle, apparel, furniture, equipment, and her forbidden cargo shall be forfeited to the United States.

TITLE VIII.

DISTURBANCE OF FOREIGN RELATIONS.

Section 1. Whoever, in relation to any dispute or controversy between a foreign government and the United States, shall willfully and

knowingly make any untrue statement, either orally or in writing, under oath before any person authorized and empowered to administer oaths, which the affiant has knowledge or reason to believe will, or may be used to influence the measures or conduct of any foreign government, or of any officer or agent of any foreign government, to the injury of the United States, or with a view or intent to influence any measure of or action by the Government of the United States, or any branch thereof, to the injury of the United States, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

Sec. 2. Whoever within the jurisdiction of the United States shall falsely assume or pretend to be a diplomatic or consular, or other official of a foreign government duly accredited as such to the Government of the United States with intent to defraud such foreign government or any person, and shall take upon himself to act as such, or in such pretended character shall demand or obtain, or attempt to obtain from any person or from said foreign government, or from any officer thereof, any money, paper, document, or other thing of value, shall be fined not more than \$5,000, or imprisoned not more than five years, or both.

Sec. 3. Whoever, other than a diplomatic or consular officer or attaché, shall act in the United States as an agent of a foreign government without prior notification to the Secretary of State shall be fined not more than \$5,000, or imprisoned not more than five years, or both.

Sec. 4. The words "foreign government," as used in this Act and in sections one hundred and fifty-six, one hundred and fifty-seven, one hundred and sixty-one, one hundred and seventy, one hundred and seventy-one, one hundred and seventy-two, one hundred and seventy-three, and two hundred and twenty of the Act of March fourth, nineteen hundred and nine, entitled "An Act to codify, revise, and amend the penal laws of the United States," shall be deemed to include any Government, faction, or body of insurgents within a country with which the United States is at peace, which Government, faction, or body of insurgents may or may not have been recognized by the United States as a Government.

Sec. 5. If two or more persons within the jurisdiction of the United States conspire to injure or destroy specific property situated within a foreign country and belonging to a foreign Government or to any political subdivision thereof with which the United States is at peace, or any railroad, canal, bridge, or other public utility so situated, and if one or more of such persons commits an act within the jurisdiction of the United States to effect the object of the conspiracy, each of the parties to the conspiracy shall be fined not more than \$5,000, or imprisoned not more than three years, or both. Any indictment or information under this section shall describe the specific property which it was the object of the conspiracy to injure or destroy.

TITLE IX.

PASSPORTS.

Section. 1. Before a passport is issued to any person by or under authority of the United States such person shall subscribe to and submit a written application duly verified by his oath before a person au-

thorized and empowered to administer oaths, which said application shall contain a true recital of each and every matter of fact which may be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance of any such passport. Clerks of United States courts, agents of the Department of State, or other Federal officials authorized, or who may be authorized, to take passport applications and administer oaths thereon, shall collect, for all services in connection therewith, a fee of \$1, and no more, in lieu of all fees prescribed by any statute of the United States, whether the application is executed singly, in duplicate, or in triplicate.

Sec. 2. Whoever shall willfully and knowingly make any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws, or whoever shall willfully and knowingly use or attempt to use, or furnish to another for use, any passport the issue of which was secured in any way by reason of any false statement, shall be fined not more than \$2,000 or imprisoned not more than five years or both.

Sec. 3. Whoever shall willfully and knowingly use, or attempt to use, any passport issued or designed for the use of another than himself, or whoever shall willfully and knowingly use or attempt to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports, which said rules shall be printed on the passport; or whoever shall willfully and knowingly furnish, dispose of, or deliver a passport to any person, for use by another than the person for whose use it was originally issued and designed, shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

Sec. 4. Whoever shall falsely make, forge, counterfeit, mutilate, or alter, or cause or procure to be falsely made, forged, counterfeited, mutilated, or altered any passport or instrument purporting to be a passport, with intent to use the same, or with intent that the same may be used by another; or whoever shall willfully or knowingly use, or attempt to use, or furnish to another for use any such false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport, or any passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same, shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

TITLE X.

COUNTERFEITING GOVERNMENT SEAL.

Section 1. Whoever shall fraudulently or wrongfully affix or impress the seal of any executive department, or of any bureau, commission, or office of the United States, to or upon any certificate, instrument, commission, document, or paper of any description; or whoever with knowledge of its fraudulent character, shall with wrongful or fraudulent intent use, buy, procure, sell, or transfer to another any such certificate, instrument, commission, document, or paper, to which or

upon which said seal has been so fraudulently affixed or impressed, shall be fined not more than \$5,000 or imprisoned not more than five years or both.

Sec. 2. Whoever shall falsely make, forge, counterfeit, mutilate, or alter, or cause or procure to be made, forged, counterfeited, mutilated, or altered, or shall willingly assist in falsely making, forging, counterfeiting, mutilating, or altering, the seal of any executive department, or any bureau, commission, or office of the United States, or whoever shall knowingly use, affix, or impress any such fraudulently made, forged, counterfeited, mutilated, or altered seal to or upon any certificate, instrument, commission, document, or paper, of any description, or whoever with wrongful or fraudulent intent shall have possession of any such falsely made, forged, counterfeited, mutilated, or altered seal, knowing the same to have been so falsely made, forged, counterfeited, mutilated, or altered, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both.

Sec. 3. Whoever shall falsely make, forge, counterfeit, alter, or tamper with any naval, military, or official pass or permit, issued by or under the authority of the United States, or with wrongful or fraudulent intent shall use or have in his possession any such pass or permit, or shall personate or falsely represent himself to be or not to be a person to whom such pass or permit has been duly issued, or shall willfully allow any other person to have or use any such pass or permit, issued for his use alone, shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

TITLE XI.

SEARCH WARRANTS.

Section 1. A search warrant authorized by this title may be issued by a judge of a United States district court, or by a judge of a State or Territorial court of record, or by a United States commissioner for the district wherein the property sought is located.

Sec. 2. A search warrant may be issued under this title upon either of the following grounds:

1. When the property was stolen or embezzled in violation of a law of the United States; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.

2. When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.

3. When the property, or any paper, is possessed, controlled, or used in violation of section twenty-two of this title; in which case it may be taken on the warrant from the person violating said section, or from any person in whose possession it may be, or from any house or other place in which it is concealed.

Sec. 3. A search warrant can not be issued but upon probable

cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.

Sec. 4. The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.

Sec. 5. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

Sec. 6. If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner.

Sec. 7. A search warrant may in all cases be served by any of the officers mentioned in its direction, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

Sec. 8. The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.

Sec. 9. He may break open any outer or inner door or window of a house for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation.

Sec. 10. The judge or commissioner must insert a direction in the warrant that it be served in the daytime, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night.

Sec. 11. A search warrant must be executed and returned to the judge or commissioner who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void.

Sec. 12. When the officer takes property under the warrant, he must give a copy of the warrant together with a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or, in the absence of any person, he must leave it in the place where he found the property.

Sec. 13. The officer must forthwith return the warrant to the judge or commissioner and deliver to him a written inventory of the property taken, made publicly or in the presence of the person from whose possession it was taken, and of the applicant for the warrant,

if they are present, verified by the affidavit of the officer at the foot of the inventory and taken before the judge or commissioner at the time, to the following effect: "I, R. S., the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant."

Sec. 14. The judge or commissioner must thereupon, if required, deliver a copy of the inventory to the person from whose possession the property was taken and to the applicant for the warrant.

Sec. 15. If the grounds on which the warrant was issued be controverted, the judge or commissioner must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and subscribed by each witness.

Sec. 16. If it appears that the property or paper taken is not the same as that described in the warrant or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the judge or commissioner must cause it to be restored to the person from whom it was taken; but if it appears that the property or paper taken is the same as that described in the warrant and that there is probable cause for believing the existence of the grounds on which the warrant was issued, then the judge or commissioner shall order the same retained in the custody of the person seizing it or to be otherwise disposed of according to law.

Sec. 17. The judge or commissioner must annex the affidavits, search warrant, return, inventory, and evidence, and if he has not power to inquire into the offense in respect to which the warrant was issued he must at once file the same, together with a copy of the record of his proceedings, with the clerk of the court having power to so inquire.

Sec. 18. Whoever shall knowingly and willfully obstruct, resist, or oppose any such officer or person in serving or attempting to serve or execute any such search warrant, or shall assault, beat, or wound any such officer or person, knowing him to be an officer or person so authorized, shall be fined not more than \$1,000 or imprisoned not more than two years.

Sec. 19. Sections one hundred and twenty-five and one hundred and twenty-six of the Criminal Code of the United States shall apply to and embrace all persons making oath or affirmation or procuring the same under the provisions of this title, and such persons shall be subject to all the pains and penalties of said sections.

Sec. 20. A person who maliciously and without probable cause procures a search warrant to be issued and executed shall be fined not more than \$1,000 or imprisoned not more than one year.

Sec. 21. An officer who in executing a search warrant willfully exceeds his authority, or exercises it with unnecessary severity, shall be fined not more than \$1,000 or imprisoned not more than one year.

Sec. 22. Whoever, in aid of any foreign Government, shall knowingly and willfully have possession of or control over any property or papers designed or intended for use or which is used as the means of violating any penal statute, or any of the rights or obligations of the United States under any treaty or the law of nations, shall be fined not more than \$1,000 or imprisoned not more than two years, or both.

Sec. 23. Nothing contained in this title shall be held to repeal or impair any existing provisions of law regulating search and the issue of search warrants.

TITLE XII.

USE OF MAILS.

Section. 1. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind, in violation of any of the provisions of this Act is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier: Provided, That nothing in this Act shall be so construed as to authorize any person other than an employé of the Dead Letter Office, duly authorized thereto, or other person upon a search warrant authorized by law, to open any letter not addressed to himself.

Sec. 2. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind, containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, is hereby declared to be nonmailable.

Sec. 3. Whoever shall use or attempt to use the mails or Postal Service of the United States for the transmission of any matter declared by this title to be nonmailable, shall be fined not more than \$5,000 or imprisoned not more than five years, or both. Any person violating any provision of this title may be tried and punished either in the district in which the unlawful matter or publication was mailed, or to which it was carried by mail for delivery according to the direction thereon, or in which it was caused to be delivered by mail to the person to whom it was addressed.

TITLE XIII.

GENERAL PROVISIONS.

Section 1. The term "United States" as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

Sec. 2. The several courts of first instance in the Philippine Islands and the district court of the Canal Zone shall have jurisdiction of offenses under this Act committed within their respective districts, and concurrent jurisdiction with the district courts of the United States of offenses under this Act committed upon the high seas, and of conspiracies to commit such offenses, as defined by section thirty-seven of the Act entitled "An Act to codify, revise, and amend the penal laws of the United States," approved March fourth, nineteen hundred and nine, and the provisions of said section, for the purpose of this Act, are hereby extended to the Philippine Islands, and to the Canal Zone. In such cases the district attorneys of the Philippine Islands and of the Canal Zone shall have the powers and perform the duties provided in this Act for United States attorneys.

Sec. 3. Offenses committed and penalties, forfeitures, or liabilities incurred prior to the taking effect hereof under any law embraced in

or changed, modified, or repealed by any chapter of this Act may be prosecuted and punished, and suits and proceedings for causes arising or acts done or committed prior to the taking effect hereof may be commenced and prosecuted, in the same manner and with the same effect as if this Act had not been passed.

Sec. 4. If any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Approved, June 15, 1917.

[Public—No. 150—65th Congress. H. R. 8753.]

An Act to amend section three, title one, of the Act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June fifteenth, nineteen hundred and seventeen and for other purposes. [May 16, 1918.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section three of title one of the Act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June fifteenth, nineteen hundred and seventeen, be, and the same is hereby, amended so as to read as follows:

"Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, or shall willfully make or convey false reports or false statements, or say or do anything except by way of bona fide and not disloyal advice to an investor or investors, with intent to obstruct the sale by the United States of bonds or other securities of the United States or the making of loans by or to the United States, and whoever, when the United States is at war, shall willfully cause, or attempt to cause, or incite or attempt to incite, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, and whoever, when the United States is at war, shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform

of the Army or Navy of the United States into contempt, scorn, contumely, or disrepute, or shall willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or shall willfully display the flag of any foreign enemy, or shall willfully by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, and whoever shall willfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated, and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more by \$10,000 or imprisonment for not more than twenty years, or both: Provided, That any employee or official of the United States Government who commits any disloyal act or utters any unpatriotic or disloyal language, or who, in an abusive and violent manner criticizes the Army or Navy or the flag of the United States shall be at once dismissed from the service. Any such employee shall be dismissed by the head of the department in which the employee may be engaged, and any such official shall be dismissed by the authority having power to appoint a successor to the dismissed official."

Sec. 2. That section one of Title XII and all other provisions of the Act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June fifteenth, nineteen hundred and seventeen, which apply to section three of Title I thereof shall apply with equal force and effect to said section three as amended.

Title XII of the said Act of June fifteenth, nineteen hundred and seventeen, be, and the same is hereby, amended by adding thereto the following section:

Sec. 4. When the United States is at war, the Postmaster General may, upon evidence satisfactory to him that any person or concern is using the mails in violation of any of the provisions of this Act, instruct the postmaster at any post office at which mail is received addressed to such person or concern to return to the postmaster at the office at which they were originally mailed all letters or other matter so addressed, with the words 'Mail to this address undeliverable under Espionage Act' plainly written or stamped upon the outside thereof, and all such letters or other matter so returned to such postmasters shall be by them returned to the senders thereof under such regulations as the Postmaster General may prescribe."

Approved, May 16, 1918.

10. LAND CONDEMNATION ACT

[Public—No. 20—65th Congress. S. 2453.]

An Act to authorize condemnation proceedings of lands for military purposes. [July 2, 1917.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter the Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, and military training camps, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: Provided, That when the owner of such land, interest or rights pertaining thereto shall fix a price for the same, which, in the opinion of the Secretary of War, shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay: Provided further, That the Secretary of War is hereby authorized to accept on behalf of the United States donations of land and the interest and rights pertaining thereto required for the above-mentioned purposes: And provided further, That when such property is acquired in time of war or the imminence thereof upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes, and the provision of section three hundred and fifty-five of the Revised Statutes, providing that no public money shall be expended upon such land until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land is located has been given, shall be, and the same are hereby, suspended during the period of the existing emergency.

Approved, July 2, 1917.

11. PRIORITY SHIPMENT ACT

[Public—No. 39—65th Congress. S. 2356.]

An Act to amend the Act to regulate commerce as amended, and for other purposes. [August 10, 1917.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of the act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, be further amended by adding thereto the following: * * *

"That during the continuance of the war in which the United States

is now engaged the President is authorized, if he finds it necessary for the national defense and security, to direct that such traffic or such shipments of commodities as, in his judgment, may be essential to the national defense and security shall have preference or priority in transportation by any common carrier by railroad, water, or otherwise. He may give these directions at and for such times as he may determine, and may modify, change, suspend, or annul them, and for any such purpose he is hereby authorized to issue orders direct, or through such person or persons as he may designate for the purpose or through the Interstate Commerce Commission. Officials of the United States, when so designated, shall receive no compensation for their services rendered hereunder. Persons not in the employ of the United States so designated shall receive such compensation as the President may fix. Suitable offices may be rented and all necessary expenses, including compensation of persons so designated, shall be paid as directed by the President out of funds which may have been or may be provided to meet expenditures for the national security and defense. The common carriers subject to the Act to regulate commerce or as many of them as desire so to do are hereby authorized without responsibility or liability on the part of the United States, financial or otherwise, to establish and maintain in the city of Washington during the period of the war an agency empowered by such carriers as join in the arrangement to receive on behalf of them all notice and service of such orders and directions as may be issued in accordance with this Act and service upon such agency shall be good service as to all the carriers joining in the establishment thereof. And it shall be the duty of any and all the officers, agents, or employees of such carriers by railroad or water or otherwise to obey strictly and conform promptly to such orders, and failure knowingly and willfully to comply therewith, or to do or perform whatever is necessary to the prompt execution of such order, shall render such officers, agents, or employees guilty of a misdemeanor, and any such officer, agent, or employee shall, upon conviction, be fined not more than \$5,000, or imprisoned not more than one year, or both, in the discretion of the court. For the transportation of persons or property in carrying out the orders and directions of the President, just and reasonable rates shall be fixed by the Interstate Commerce Commission; and if the transportation be for the Government of the United States, it shall be paid for currently or monthly by the Secretary of the Treasury out of any funds not otherwise appropriated. Any carrier complying with any such order or direction for preference or priority herein authorized shall be exempt from any and all provisions in existing law imposing civil or criminal pains, penalties, obligations, or liabilities upon carriers by reason of giving preference or priority in compliance with such order or direction."

Approved, August 10, 1917.

12. FOOD AND FUEL CONTROL ACT

[Public—No. 41—65th Congress. H. R. 4961.]

An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel. [August 10, 1917.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement, of foods, feeds, fuel including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds, and fuel, hereafter in this Act called necessities; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessities during the war. For such purposes the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred, and prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this Act.

Sec. 2. That in carrying out the purposes of this Act the President is authorized to enter into any voluntary arrangements or agreements, to create and use any agency or agencies, to accept the services of any person without compensation, to cooperate with any agency or person, to utilize any department or agency of the Government, and to coordinate their activities so as to avoid any preventable loss or duplication of effort or funds.

Sec. 3. That no person acting either as a voluntary or paid agent or employee of the United States in any capacity, including an advisory capacity, shall solicit, induce, or attempt to induce any person or officer authorized to execute or to direct the execution of contracts on behalf of the United States to make any contract or give any order for the furnishing to the United States of work, labor, or services, or of materials, supplies, or other property of any kind or character, if such agent or employee has any pecuniary interest in such contract or order, or if he or any firm of which he is a member, or corporation, joint-stock company, or association of which he is an officer or stockholder, or in the pecuniary profits of which he is directly or indirectly interested, shall be a party thereto. Nor shall any agent or employee make, or permit any committee or other body of which he is a member to make, or participate in making, any recommendation concerning such contract or order to any council, board, or commission of the United States, or any member or subordinate thereof, without making to the best of his knowledge and belief a full and complete disclosure in writing to such council, board, commission, or subordinate of any and every pecuniary interest which

he may have in such contract or order and of his interest in any firm, corporation, company, or association being a party thereto. Nor shall he participate in the awarding of such contract or giving such order. Any willful violation of any of the provisions of this section shall be punishable by a fine of not more than \$10,000, or by imprisonment of not more than five years, or both: Provided, That the provisions of this section shall not change, alter or repeal section forty-one of chapter three hundred and twenty-one, Thirty-fifth Statutes at Large.

Sec. 4. That it is hereby made unlawful for any person willfully to destroy any necessities for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessities in or in connection with their production, manufacture, or distribution; to hoard, as defined in section six of this Act, any necessities; to monopolize or attempt to monopolize, either locally or generally, any necessities; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessities; to conspire, combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessities; (b) to restrict the supply of any necessities; (c) to restrict distribution of any necessities; (d) to prevent, limit, or lessen the manufacture or production of any necessities in order to enhance the price thereof, or (e) to exact excessive prices for any necessities; or to aid or abet the doing of any act made unlawful by this section.

Sec. 5. That, from time to time, whenever the President shall find it essential to license the importation, manufacture, storage, mining, or distribution of any necessities, in order to carry into effect any of the purposes of this Act, and shall publicly so announce, no person shall, after a date fixed in the announcement, engage in or carry on any such business specified in the announcement of importation, manufacture, storage, mining, or distribution of any necessities as set forth in such announcement, unless he shall secure and hold a license issued pursuant to this section. The President is authorized to issue such licenses and to prescribe regulations for the issuance of licenses and requirements for systems of accounts and auditing of accounts to be kept by licensees, submission of reports by them, with or without oath or affirmation, and the entry and inspection by the President's duly authorized agents of the places of business of licensees. Whenever the President shall find that any storage charge, commission, profit, or practice of any licensee is unjust, or unreasonable, or discriminatory and unfair, or wasteful, and shall order such licensee, within a reasonable time fixed in the order, to discontinue the same, unless such order, which shall recite the facts found, is revoked or suspended, such licensee shall, within the time prescribed in the order, discontinue such unjust, unreasonable, discriminatory and unfair storage charge, commission, profit, or practice. The President may, in lieu of any such unjust, unreasonable, discriminatory, and unfair storage charge, commission, profit, or practice, find what is a just, reasonable, nondiscriminatory and fair storage

charge, commission, profit, or practice, and in any proceeding brought in any court such order of the President shall be prima facie evidence. Any person who, without a license issued pursuant to this section, or whose license shall have been revoked, knowingly engages in or carries on any business for which a license is required under this section, or willfully fails or refuses to discontinue any unjust, unreasonable, discriminatory and unfair storage charge, commission, profit, or practice, in accordance with the requirement of an order issued under this section, or any regulation prescribed under this section, shall, upon conviction thereof, be punished by a fine not exceeding \$5,000, or by imprisonment for not more than two years, or both: Provided, That this section shall not apply to any farmer, gardener, cooperative association of farmers or gardeners, including live-stock farmers, or other persons with respect to the products of any farm, garden, or other land owned, leased, or cultivated by him, nor to any retailer with respect to the retail business actually conducted by him, nor to any common carrier, nor shall anything in this section be construed to authorize the fixing or imposition of a duty or tax upon any article imported into or exported from the United States or any State, Territory, or the District of Columbia: Provided further, That for the purposes of this Act a retailer shall be deemed to be a person, copartnership, firm, corporation, or association not engaging in the wholesale business whose gross sales do not exceed \$100,000 per annum.

Sec. 6. That any person who willfully hoards any necessities shall upon conviction thereof be fined not exceeding \$5,000 or be imprisoned for not more than two years, or both. Necessaries shall be deemed to be hoarded within the meaning of this Act when either (a) held, contracted for, or arranged for by any person in a quantity in excess of his reasonable requirements for use or consumption by himself and dependents for a reasonable time; (b) held, contracted for, or arranged for by any manufacturer, wholesaler, retailer, or other dealer in a quantity in excess of the reasonable requirements of his business for use or sale by him for a reasonable time, or reasonably required to furnish necessities produced in surplus quantities seasonally throughout the period of scant or no production; or (c) withheld, whether by possession or under any contract or arrangement, from the market by any person for the purpose of unreasonably increasing or diminishing the price: Provided, That this section shall not include or relate to transactions on any exchange, board of trade, or similar institution or place of business as described in section thirteen of this Act that may be permitted by the President under the authority conferred upon him by said section thirteen: Provided, however, That any accumulating or withholding by any farmer or gardener, cooperative association of farmers or gardeners, including live-stock farmers, or any other person, of the products of any farm, garden, or other land owned, leased, or cultivated by him shall not be deemed to be hoarding within the meaning of this Act.

Sec. 7. That whenever any necessities shall be hoarded as defined in section six they shall be liable to be proceeded against in any district court of the United States within the district where the same are found and seized by a process of libel for condemnation, and if

such necessities shall be adjudged to be hoarded they shall be disposed of by sale in such manner as to provide the most equitable distribution thereof as the court may direct, and the proceeds thereof, less the legal costs and charges, shall be paid to the party entitled thereto. The proceedings of such libel cases shall conform as near as may be to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all such proceedings shall be at the suit of and in the name of the United States. It shall be the duty of the United States attorney for the proper district to institute and prosecute any such action upon presentation to him of satisfactory evidence to sustain the same.

Sec. 8. That any person who willfully destroys any necessities for the purpose of enhancing the price or restricting the supply thereof shall, upon conviction thereof, be fined not exceeding \$5,000 or imprisoned for not more than two years, or both.

Sec. 9. That any person who conspires, combines, agrees, or arranges with any other person (a) to limit the facilities for transporting, producing, manufacturing, supplying, storing, or dealing in any necessities; (b) to restrict the supply of any necessities; (c) to restrict the distribution of any necessities; (d) to prevent, limit, or lessen the manufacture or production of any necessities in order to enhance the price thereof shall, upon conviction thereof, be fined not exceeding \$10,000 or be imprisoned for not more than two years, or both.

Sec. 10. That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amount as will be just compensation for such necessities or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies: Provided, That nothing in this section, or in the section that follows, shall be construed to require any natural person to furnish to the Government any necessities held by him and reasonably required for consumption or use by himself and dependents, nor shall any person, firm, corporation, or association be required to furnish to the Government any seed necessary for the seeding of land owned, leased, or cultivated by them.

Sec. 11. That the President is authorized from time to time to purchase, to store, to provide storage facilities for, and to sell for cash at reasonable prices, wheat, flour, meal, beans, and potatoes: Provided, That if any minimum price shall have been theretofore fixed, pursuant to the provisions of section fourteen of this Act, then the price paid for any such articles so purchased shall not be less than such minimum price. Any moneys received by the United States from or in connection with the disposal by the United States of nec-

essaries under this section may, in the discretion of the President, be used as a revolving fund for further carrying out the purposes of this section. Any balance of such moneys not used as part of such revolving fund shall be covered into the Treasury as miscellaneous receipts.

Sec. 12. That whenever the President shall find it necessary to secure an adequate supply of necessities for the support of the Army or the maintenance of the Navy, or for any other public use connected with the common defense, he is authorized to requisition and take over, for use or operation by the Government, any factory, packing house, oil pipe line, mine, or other plant, or any part thereof, in or through which any necessities are or may be manufactured, produced, prepared, or mined, and to operate the same. Whenever the President shall determine that the further use or operation by the Government of any such factory, mine, or plant, or part thereof, is not essential for the national security or defense, the same shall be restored to the person entitled to the possession thereof. The United States shall make just compensation, to be determined by the President, for the taking over, use, occupation, and operation by the Government of any such factory, mine, or plant, or part thereof. If the compensation so determined be unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation, in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. The President is authorized to prescribe such regulations as he may deem essential for carrying out the purposes of this section, including the operation of any such factory, mine, or plant, or part thereof, the purchase, sale, or other disposition of articles used, manufactured, produced, prepared, or mined therein, and the employment, control, and compensation of employees. Any moneys received by the United States from or in connection with the use or operation of any such factory, mine, or plant, or part thereof, may, in the discretion of the President, be used as a revolving fund for the purpose of the continued use or operation of any such factory, mine, or plant, or part thereof, and the accounts of each such factory, mine, plant, or part thereof, shall be kept separate and distinct. Any balance of such moneys not used as part of such revolving fund shall be paid into the Treasury as miscellaneous receipts.

Sec. 13. That whenever the President finds it essential in order to prevent undue enhancement, depression, or fluctuation of prices of, or in order to prevent injurious speculation in, or in order to prevent unjust market manipulation or unfair and misleading market quotations of the prices of necessities, hereafter in this section called evil practices, he is authorized to prescribe such regulations governing, or may either wholly or partly prohibit, operations, practices, and transactions at, on, in, or under the rules of any exchange, board of trade, or similar institution or place of business as he may find essential in order to prevent, correct, or remove such evil practices. Such regulations may require all persons coming within their provisions to

keep such records and statements of account, and may require such persons to make such returns, verified under oath or otherwise, as will fully and correctly disclose all transactions at, in, or on, or under the rules of any such exchange, board of trade, or similar institution or place of business, including the making, execution, settlement, and fulfillment thereof. He may also require all persons acting in the capacity of a clearing house, clearing association, or similar institution, for the purpose of clearing, settling, or adjusting transactions at, in, or on, or under the rules of any such exchange, board of trade, or similar institution or place of business, to keep such records and to make such returns as will fully and correctly disclose all facts in their possession relating to such transactions, and he may appoint agents to conduct the investigations necessary to enforce the provisions of this section and all rules and regulations made by him in pursuance thereof, and may fix and pay the compensation of such agents. Any person who willfully violates any regulation made pursuant to this section, or who knowingly engages in any operation, practice, or transaction prohibited pursuant to this section, or who willfully aids or abets any such violation or any such prohibited operation, practice, or transaction, shall, upon conviction thereof, be punished by a fine not exceeding \$10,000 or by imprisonment for not more than four years, or both.

Sec. 14. That whenever the President shall find that an emergency exists requiring stimulation of the production of wheat and that it is essential that the producers of wheat, produced within the United States, shall have the benefits of the guaranty provided for in this section, he is authorized, from time to time seasonably and as far in advance of seeding time as practicable, to determine and fix and to give public notice of what, under specified conditions, is a reasonable guaranteed price for wheat, in order to assure such producers a reasonable profit. The President shall thereupon fix such guaranteed price for each of the official grain standards for wheat as established under the United States grain standards Act, approved August eleventh, nineteen hundred and sixteen. The President shall from time to time establish and promulgate such regulations as he shall deem wise in connection with such guaranteed prices, and in particular governing conditions of delivery and payment, and differences in price for the several standard grades in the principal primary markets of the United States, adopting number one northern spring or its equivalent at the principal interior primary markets as the basis. Thereupon, the Government of the United States hereby guarantees every producer of wheat produced within the United States, that, upon compliance by him with the regulations prescribed, he shall receive for any wheat produced in reliance upon this guarantee within the period, not exceeding eighteen months, prescribed in the notice, a price not less than the guaranteed price therefor as fixed pursuant to this section. In such regulations the President shall prescribe the terms and conditions upon which any such producer shall be entitled to the benefits of such guaranty. The guaranteed prices for the several standard grades of wheat for the crop of nineteen hundred and eighteen, shall be based upon num-

ber one northern spring or its equivalent at not less than \$2 per bushel at the principal interior primary markets. This guaranty shall not be dependent upon the action of the President under the first part of this section, but is hereby made absolute and shall be binding until May first, nineteen hundred and nineteen. When the President finds that the importation into the United States of any wheat produced outside of the United States materially enhances or is likely materially to enhance the liabilities of the United States under guaranties of prices therefor made pursuant to this section, and ascertains what rate of duty, added to the then existing rate of duty on wheat and to the value of wheat at the time of importation, would be sufficient to bring the price thereof at which imported up to the price fixed therefor pursuant to the foregoing provisions of this section, he shall proclaim such facts, and thereafter there shall be levied, collected, and paid upon wheat when imported in addition to the then existing rate of duty, the rate of duty so ascertained; but in no case shall any such rate of duty be fixed at an amount which will effect a reduction of the rate of duty upon wheat under any then existing tariff law of the United States. For the purpose of making any guaranteed price effective under this section, or whenever he deems it essential in order to protect the Government of the United States against material enhancement of its liabilities arising out of any guaranty under this section, the President is authorized also, in his discretion, to purchase any wheat for which a guaranteed price shall be fixed under this section, and to hold, transport, or store it, or to sell, dispose of, and deliver the same to any citizen of the United States or to any Government engaged in war with any country with which the Government of the United States is or may be at war or to use the same as supplies for any department or agency of the Government of the United States. Any moneys received by the United States from or in connection with the sale or disposal of wheat under this section may, in the discretion of the President, be used as a revolving fund for further carrying out the purposes of this section. Any balance of such moneys not used as part of such revolving fund shall be covered into the Treasury as miscellaneous receipts.

Sec. 15. That from and after thirty days from the date of the approval of this Act no foods, fruits, food materials, or feeds shall be used in the production of distilled spirits for beverage purposes: Provided, That under such rules, regulations, and bonds as the President may prescribe, such materials may be used in the production of distilled spirits exclusively for other than beverage purposes, or for the fortification of pure sweet wines as defined by the Act entitled "An Act to increase the revenue, and for other purposes," approved September eighth, nineteen hundred and sixteen. Nor shall there be imported into the United States any distilled spirits. Whenever the President shall find that limitation, regulation, or prohibition of the use of foods, fruits, food materials, or feeds in the production of malt or vinous liquors for beverage purposes, or that reduction of the alcoholic content of any such malt or vinous liquor, is essential, in order to assure an adequate and continuous supply of food, or that the national security and defense will be subserved

thereby, he is authorized, from time to time, to prescribe and give public notice of the extent of the limitation, regulation, prohibition, or reduction so necessitated. Whenever such notice shall have been given and shall remain unrevoked no person shall, after a reasonable time prescribed in such notice, use any foods, fruits, food materials, or feeds in the production of malt or vinous liquors, or import any such liquors except under license issued by the President and in compliance with rules and regulations determined by him governing the production and importation of such liquors and the alcoholic content thereof. Any person who willfully violates the provisions of this section, or who shall use any foods, fruits, food materials, or feeds in the production of malt or vinous liquors, or who shall import any such liquors, without first obtaining a license so to do when a license is required under this section, or who shall violate any rule or regulation made under this section, shall be punished by a fine not exceeding \$5,000, or by imprisonment for not more than two years, or both: Provided further, That nothing in this section shall be construed to authorize the licensing of the manufacture of vinous or malt liquors in any State, Territory, or the District of Columbia, or any civil subdivision thereof, where the manufacture of such vinous or malt liquor is prohibited.

Sec. 16. That the President is authorized and directed to commandeer any or all distilled spirits in bond or in stock at the date of the approval of this Act for redistillation, in so far as such redistillation may be necessary to meet the requirements of the Government in the manufacture of munitions and other military and hospital supplies, or in so far as such redistillation would dispense with the necessity of utilizing products and materials suitable for foods and feeds in the future manufacture of distilled spirits for the purposes herein enumerated. The President shall determine and pay a just compensation for the distilled spirits so commandeered; and if the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation for such spirits, in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

Sec. 17. That every person who willfully assaults, resists, impedes, or interferes with any officer, employee, or agent of the United States in the execution of any duty authorized to be performed by or pursuant to this Act shall upon conviction thereof be fined not exceeding \$1,000 or be imprisoned for not more than one year, or both.

Sec. 18. That the sum of \$2,500,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be available until June thirtieth, nineteen hundred and eighteen, for the payment of such rent, the expense, including postage, of such printing and publications, the purchase of such material and equipment, and the employment of such persons and means, in the city of Washington and elsewhere, as the President may deem essential.

Sec. 19. That for the purposes of this Act the sum of \$150,000,000

is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be available during the time this Act is in effect: Provided, That no part of this appropriation shall be expended for the purposes described in the preceding section: Provided further, That itemized statements covering all purchases and disbursements under this and the preceding section shall be filed with the Secretary of the Senate and the Clerk of the House of Representatives on or before the twenty-fifth day of each month after the taking effect of this Act, covering the business of the preceding month, and said statements shall be subject to public inspection.

Sec. 20. That the employment of any person under the provisions of this Act shall not exempt any such person from military service under the provisions of the selective draft law approved May eighteenth, nineteen hundred and seventeen.

Sec. 21. The President shall cause a detailed report to be made to the Congress on the first day of January each year of all proceedings had under this Act during the year preceding. Such report shall, in addition to other matters, contain an account of all persons appointed or employed, the salary or compensation paid or allowed each, the aggregate amount of the different kinds of property purchased or requisitioned, the use and disposition made of such property, and a statement of all receipts, payments, and expenditures, together with a statement showing the general character, and estimated value of all property then on hand, and the aggregate amount and character of all claims against the United States growing out of this Act.

Sec. 22. That if any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof, directly involved in the controversy in which such judgment shall have been rendered.

Sec. 23. That words used in this Act shall be construed to import the plural or the singular, as the case demands. The word "person," wherever used in this Act, shall include individuals, partnerships, associations, and corporations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any official, agent, or other person acting for or employed by any partnership, association, or corporation within the scope of his employment or office shall, in every case, also be deemed the act, omission, or failure of such partnership, association, or corporation as well as that of the person.

Sec. 24. That the provisions of this Act shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President; but the termination of this Act shall not affect any act done, or any right or obligation accruing or accrued, or any suit or proceeding had or commenced in any civil case before the said termination pursuant to this Act; but all rights and liabilities under this Act arising before its termination shall continue and may be enforced in the same manner as if the Act had not terminated. Any offense committed and all penalties, forfeitures, or liabilities incurred prior to such termination

may be prosecuted or punished in the same manner and with the same effect as if this Act had not been terminated.

Sec. 25. That the President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign: said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission during the war or for such part of said time as in his judgment may be necessary.

That if, in the opinion of the President, any such producer or dealer fails or neglects to conform to such prices or regulations, or to conduct his business efficiently under the regulations and control of the President as aforesaid, or conducts it in a manner prejudicial to the public interest, then the President is hereby authorized and empowered in every such case to requisition and take over the plant, business, and all appurtenances thereof belonging to such producer or dealer as a going concern, and to operate or cause the same to be operated in such manner and through such agency as he may direct during the period of the war or for such part of said time as in his judgment may be necessary.

That any producer or dealer whose plant, business, and appurtenances shall have been requisitioned or taken over by the President shall be paid a just compensation for the use thereof during the period that the same may be requisitioned or taken over as aforesaid, which compensation the President shall fix or cause to be fixed by the Federal Trade Commission.

That if the prices so fixed, or if, in the case of the taking over or requisitioning of the mines or business of any such producer or dealer the compensation therefor as determined by the provisions of this Act be not satisfactory to the person or persons entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

While operating or causing to be operated any such plants or business, the President is authorized to prescribe such regulations as he may deem essential for the employment, control, and compensation of the employees necessary to conduct the same.

Or if the President of the United States shall be of the opinion that he can thereby better provide for the common defense, and whenever, in his judgment, it shall be necessary for the efficient prosecution of the war, then he is hereby authorized and empowered to require any or all producers of coal and coke, either in any special area or in any special coal fields, or in the entire United States, to sell their products only to the United States through an agency to be designated by the President, such agency to regulate the resale

of such coal and coke, and the prices thereof, and to establish rules for the regulation of and to regulate the methods of production, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign, and to make payment of the purchase price thereof to the producers thereof, or to the person or persons legally entitled to said payment.

That within fifteen days after notice from the agency so designated to any producer of coal and coke that his, or its, output is to be so purchased by the United States as hereinbefore described, such producer shall cease shipments of said product upon his own account and shall transmit to such agency all orders received and unfilled or partially unfilled, showing the exact extent to which shipments have been made thereon, and thereafter all shipments shall be made only on authority of the agency designated by the President, and thereafter no such producer shall sell any of said products except to the United States through such agency, and the said agency alone is hereby authorized and empowered to purchase during the continuance of the requirement the output of such producers.

That the prices to be paid for such products so purchased shall be based upon a fair and just profit over and above the cost of production, including proper maintenance and depletion charges, the reasonableness of such profits and cost of production to be determined by the Federal Trade Commission, and if the prices fixed by the said commission of any such product purchased by the United States as hereinbefore described be unsatisfactory to the person or persons entitled to the same, such person or persons shall be paid seventy-five per centum of the amount so determined, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

All such products so sold to the United States shall be sold by the United States at such uniform prices, quality considered, as may be practicable and as may be determined by said agency to be just and fair.

Any moneys received by the United States for the sale of any such coal and coke may, in the discretion of the President, be used as a revolving fund for further carrying out the purposes of this section. Any moneys not so used shall be covered into the Treasury as miscellaneous receipts.

That when directed by the President, the Federal Trade Commission is hereby required to proceed to make full inquiry, giving such notice as it may deem practicable, into the cost of producing under reasonably efficient management at the various places of production the following commodities, to wit, coal and coke.

The books, correspondence, records, and papers in any way referring to transactions of any kind relating to the mining, production, sale, or distribution of all mine operators or other persons whose coal and coke have or may become subject to this section, and the books, correspondence, records, and papers of any person applying for the purchase of coal and coke from the United States shall at all times

be subject to inspection by the said agency, and such person or persons shall promptly furnish said agency any data or information relating to the business of such person or persons which said agency may call for, and said agency is hereby authorized to procure the information in reference to the business of such coal-mine operators and producers of coke and customers therefor in the manner provided for in sections six and nine of the Act of Congress approved September twenty-sixth, nineteen hundred and fourteen, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and said agency is hereby authorized and empowered to exercise all the powers granted to the Federal Trade Commission by said Act for the carrying out of the purposes of this section.

Having completed its inquiry respecting any commodity in any locality, it shall, if the President has decided to fix the prices at which any such commodity shall be sold by producers and dealers generally, fix and publish maximum prices for both producers of and dealers in any such commodity, which maximum prices shall be observed by all producers and dealers until further action thereon is taken by the commission.

In fixing maximum prices for producers the commission shall allow the cost of production, including the expense of operation, maintenance, depreciation, and depletion, and shall add thereto a just and reasonable profit.

In fixing such prices for dealers, the commission shall allow the cost to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction.

The maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior to the establishment and publication of maximum prices by the commission.

Whoever shall, with knowledge that the prices of any such commodity have been fixed as herein provided, ask, demand, or receive a higher price, or whoever shall, with knowledge that the regulations have been prescribed as herein provided, violate or refuse to conform to any of the same, shall, upon conviction, be punished by fine of not more than \$5,000, or by imprisonment for not more than two years, or both. Each independent transaction shall constitute a separate offense.

Nothing in this section shall be construed as restricting or modifying in any manner the right the Government of the United States may have in its own behalf or in behalf of any other Government at war with Germany to purchase, requisition, or take over any such commodities for the equipment, maintenance, or support of armed forces at any price or upon any terms that may be agreed upon or otherwise lawfully determined.

Sec. 26. That any person carrying on or employed in commerce among the several States, or with foreign nations, or with or in the Territories or other possessions of the United States in any article suitable for human food, fuel, or other necessities of life, who, either in his individual capacity or as an officer, agent, or employee of a

corporation or member of a partnership carrying on or employed in such trade, shall store, acquire, or hold, or who shall destroy or make away with any such article for the purpose of limiting the supply thereof to the public or affecting the market price thereof in such commerce, whether temporarily or otherwise, shall be deemed guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than two years, or both: Provided, That any storing or holding by any farmer, gardner, or other person of the products of any farm, garden, or other land cultivated by him shall not be deemed to be a storing or holding within the meaning of this Act: Provided further, That farmers and fruit growers, cooperative and other exchanges, or societies of a similar character shall not be included within the provisions of this section: Provided further, That this section shall not be construed to prohibit the holding or accumulating of any such article by any such person in a quantity not in excess of the reasonable requirements of his business for a reasonable time or in a quantity reasonably required to furnish said articles produced in surplus quantities seasonally throughout the period of scant or no production. Nothing contained in this section shall be construed to repeal the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, commonly known as the Sherman Antitrust Act.

Sec. 27. That the President is authorized to procure, or aid in procuring, such stocks of nitrate of soda as he may determine to be necessary, and find available, for increasing agricultural production during the calendar years nineteen hundred and seventeen and eighteen, and to dispose of the same for cash at cost, including all expenses connected therewith. For carrying out the purposes of this section, there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, available immediately and until expended, the sum of \$10,000,000, or so much thereof as may be necessary, and the President is authorized to make such regulations, and to use such means and agencies of the Government, as, in his discretion, he may deem best. The proceeds arising from the disposition of the nitrate of soda shall go into the Treasury as miscellaneous receipts.

Approved, August 10, 1917.

13. WAR RISK INSURANCE ACT

[Public—No. 90—65th Congress. H. R. 5723.]

An Act to amend an Act entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department," approved September second, nineteen hundred and fourteen, and for other purposes. [October 6, 1917.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first section of the Act entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department," ap-

proved September second, nineteen hundred and fourteen, as amended, is hereby amended to read as follows:

"ARTICLE I.

"Section 1. That there is established in the Treasury Department a Bureau to be known as the Bureau of War Risk Insurance, the director of which shall receive a salary at the rate of \$5,000 per annum.

"That there be in such bureau a Division of Marine and Seamen's Insurance and a Division of Military and Naval Insurance in charge of a commissioner of Marine and Seamen's Insurance and a commissioner of Military and Naval Insurance, respectively, each of whom shall receive a salary of \$4,000 per annum."

Sec. 2. That such Act of September second, nineteen hundred and fourteen, as amended, is hereby amended by adding new sections, as follows:

"Sec. 12. That sections two to seven, inclusive, and section nine, shall be construed to refer only to the Division of Marine and Seamen's Insurance.

"Sec. 13. That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in sections five and four hundred and five. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director, subject to the general direction of the Secretary of the Treasury. The director shall adopt reasonable and proper rules to govern the procedure of the divisions, to regulate the matter of the compensation, if any, but in no case to exceed ten per centum, to be paid to claim agents and attorneys for services in connection with any of the matters provided for in articles two, three, and four, and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment, compensation, or insurance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the method of making investigations and medical examinations, and the manner and form of adjudications and awards.

"Sec. 14. That the bureau and its divisions shall have such deputies, assistants, actuaries, clerks, and other employees as may be from time to time provided by Congress. The bureau shall, by arrangement with the Secretary of War and the Secretary of the Navy, respectively make use of the services of surgeons in the Army and Navy. The Secretary of the Treasury is authorized to establish an advisory board consisting of three members skilled in the practice of insurance against death or disability for the purpose of assisting the Division of Military and Naval Insurance in fixing

premium rates and in the adjustment of claims for losses under the contracts of insurance provided for in article four and in adjusting claims for compensation under article three; compensation for the persons so appointed to be determined by the Secretary of the Treasury, but not to exceed \$20 a day each while actually employed.

"Sec. 15. That for the purposes of this Act, the director, commissioners, and deputy commissioners shall have power to issue subpoenas for and compel the attendance of witnesses within a radius of one hundred miles, to require the production of books, papers, documents, and other evidence, to administer oaths and to examine witnesses upon any matter within the jurisdiction of the bureau. The director may obtain such information and such reports from officials and employees of the departments of the Government of the United States and of the States as may be agreed upon by the heads of the respective departments. In case of disobedience to a subpoena, the bureau may invoke the aid of any district court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court, within the jurisdiction of which the inquiry is carried on, may, in case of contumacy or refusal to obey a subpoena issued to any officer, agent, or employee of any corporation or other person, issue an order requiring such corporation, or other person to appear before the bureau, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. Any person so required to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States.

"Sec. 16. That the director shall submit annually to the Secretary of the Treasury estimates of the appropriations necessary for the work of the bureau.

"Sec. 17. That for the purpose of carrying out the provisions of this Act there is hereby appropriated out of any moneys in the Treasury not otherwise appropriated, the sum of \$100,000, for the payment of all expenses incident to the work authorized under this Act, including salaries of the director and commissioners and of such deputies, assistants, accountants, experts, clerks, and other employees in the District of Columbia or elsewhere, as the Secretary of the Treasury may deem necessary, traveling expenses, rent and equipment of offices, typewriters and exchange of same, purchase of law books and books of reference, printing and binding to be done at the Government Printing Office, and all other necessary expenses. With the exception of the director, the commissioners, and such special experts as the Secretary of the Treasury may from time to time find necessary for the conduct of the work of the bureau, all employees of the bureau shall be appointed from lists of eligibles to be supplied by the Civil Service Commission and in accordance with the civil-service law. Such fees, allowances, and salaries shall be the same as are paid for similar services in other departments of the Government.

"Sec. 18. That there is hereby appropriated from any money in the Treasury not otherwise appropriated, the sum of \$141,000,000,

to be known as the military and naval family allowance appropriation, for the payment of the family allowances provided by Article II. Payments out of this appropriation shall be made upon and in accordance with awards by the Commissioner of the Division of Military and Naval Insurance.

"Sec. 19. That there is hereby appropriated, from any money in the Treasury not otherwise appropriated, the sum of \$12,150,000, to be known as the military and naval compensation appropriation, for the payment of the compensation, funeral expenses, services, and supplies provided by Article III. Payments out of this appropriation shall be made upon and in accordance with awards by the director.

"Sec. 20. That there is hereby appropriated, from any money in the Treasury not otherwise appropriated, the sum of \$23,000,000, to be known as the military and naval insurance appropriation. All premiums that may be collected for the insurance provided by the provisions of Article IV shall be deposited and covered into the Treasury to the credit of this appropriation.

"Such sum, including all premium payments, is hereby made available for the payment of the liabilities of the United States incurred under contracts of insurance made under the provisions of Article IV. Payments from this appropriation shall be made upon and in accordance with awards by the director.

"Sec. 21. That there shall be set aside as a separate fund in the Treasury, to be known as the military and naval pay deposit fund, all sums held out of pay as provided by section two hundred and three of this Act. Such fund, including all additions, is hereby made available for the payment of the sums so held and deposited, with interest, as provided in section two hundred and three, and the amount necessary to pay interest is hereby appropriated.

"Sec. 22. That for the purpose of this amendatory Act the marriage of the claimant to the person on account of whom the claim is made shall be shown—

"(1) By a duly verified copy of a public or church record; or

"(2) By the affidavit of the clergyman or magistrate who officiated; or

"(3) By the testimony of two or more eyewitnesses to the ceremony; or

"(4) By a duly verified copy of the church record of baptism of the children; or

"(5) By the testimony of two or more witnesses who know that the parties lived together as husband and wife, and were recognized as such, and who shall state how long, within their knowledge, such relation continued: Provided, That marriages, except such as are mentioned in section forty-seven hundred and five of the Revised Statutes, shall be proven in compensation or insurance cases to be legal marriages according to the law of the place where the parties resided at the time of marriage or at the time when the right to compensation or insurance accrued; and the open and notorious illicit cohabitation of a widow who is a claimant shall operate to terminate her right to compensation or insurance from the commencement

of such cohabitation: Provided further, That for the purpose of the administration of Article II of this Act marriage shall be conclusively presumed, in the absence of proof, that there is a legal spouse living, if the man and woman have lived together in the openly acknowledged relation of husband and wife during the two years immediately preceding the date of the declaration of war, or the date of enlistment or of entrance into or employment in active service in the military or naval forces of the United States if subsequent to such declaration."

In Articles II, III, and IV of this Act unless the context otherwise requires—

"(1) The term 'child' includes—

"(a) A legitimate child.

"(b) A child legally adopted more than six months before the enactment of this amendatory Act or before enlistment or entrance into or employment in active service in the military or naval forces of the United States, whichever of these dates is the later.

"(c) A stepchild, if a member of the man's household.

"(d) An illegitimate child, but, as to the father, only, if acknowledged by instrument in writing signed by him, or if he has been judicially ordered or decreed to contribute to such child's support, and if such child, if born after December thirty-first, nineteen hundred and seventeen, shall have been born in the United States, or in its insular possessions.

"(2) The term 'grandchild' means a child as above defined of a child as above defined.

"(3) Except as used in section four hundred and one and in section four hundred and two the terms 'child' and 'grandchild' are limited to unmarried persons either (a) under eighteen years of age, or (b) of any age, if insane, idiotic, or otherwise permanently helpless.

"(4) The term 'parent' includes a father, mother, grandfather, grandmother, stepfather, and stepmother, either of the person in the service or of the spouse.

"(5) The terms 'brother' and 'sister' include brothers and sisters of the half blood as well as those of the whole blood, stepbrothers and stepsisters, and brothers and sisters through adoption.

"(6) The term 'commissioned officer' includes a warrant officer, but includes only an officer in active service in the military or naval forces of the United States.

"(7) The terms 'man' and 'enlisted man' mean a person, whether male or female, and whether enlisted, enrolled, or drafted into active service in the military or naval forces of the United States, and include noncommissioned and petty officers, and members of training camps authorized by law.

"(8) The term 'enlistment' includes voluntary enlistment, draft, and enrollment in active service in the military or naval forces of the United States.

"(9) The term 'commissioner' means the Commissioner of Military and Naval Insurance.

"(10) The term 'injury' includes disease.

"(11) The term 'pay' means the pay for service in the United States according to grade and length of service, excluding all allowances.

"(12) The term 'military or naval forces' means the Army, the Navy, the Marine Corps, the Coast Guard, the Naval Reserves, the National Naval Volunteers, and any other branch of the United States service while serving pursuant to law with the Army or the Navy.

"Sec. 23. That when, by the terms of this amendatory Act, any payment is to be made to a minor, other than a person in the military or naval forces of the United States, or to a person mentally incompetent, such payment shall be made to the person who is constituted guardian or curator by the laws of the State or residence of claimant, or is otherwise legally vested with responsibility or care of the claimant.

"Sec. 24. That the Bureau of War Risk Insurance, so far as practicable, shall upon request furnish information to and act for persons in the military or naval service, with respect to any contracts of insurance whether with the Government or otherwise, as may be prescribed by regulations. Said bureau may upon request procure from and keep a record of the amount and kind of insurance held by every commissioned and appointive officer and of every enlisted man in the military or naval service of the United States, including the name and principal place of business of the company, society, or organization in which such insurance is held, the date of the policy, amount of premium, name and relationship of the beneficiary, and such other data as may be deemed of service in protecting the interests of the insured and beneficiaries.

"Sec. 25. That whoever in any claim for family allowance, compensation, or insurance, or in any document required by this Act or by regulation made under this Act, makes any statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than \$5,000, or by imprisonment for not more than two years, or both.

"Sec. 26. That if any person entitled to payment of family allowance or compensation under this Act, whose right to such payment under this Act ceases upon the happening of any contingency, thereafter fraudulently accepts any such payment, he shall be punished by a fine of not more than \$2,000, or by imprisonment for not more than one year, or both."

ARTICLE II.

ALLOTMENTS AND FAMILY ALLOWANCES.

Sec. 200. That the provisions of this article shall apply to all enlisted men in the military or naval forces of the United States.

Sec. 201. That allotment of pay shall, subject to the conditions, limitations, and exceptions hereinafter specified, be compulsory as to wife, a former wife divorced who has not remarried and to whom alimony has been decreed, and a child, and voluntary as to any other person; but on the written consent of the wife or former wife di-

vorced, supported by evidence satisfactory to the bureau of her ability to support herself and the children in her custody, the allotment for her and for such children may be waived; and on the enlisted man's application or otherwise for good cause shown, exemption from the allotment may be granted upon such conditions as may be prescribed by regulations.

The monthly compulsory allotment shall be in an amount equal to the family allowance hereinafter specified except that it shall not be more than one-half the pay, or less than \$15; but for a wife living separate and apart under court order or written agreement or for a former wife divorced, it shall not exceed the amount specified in the court order, decree, or written agreement to be paid to her. For an illegitimate child, to whose support the father has been judicially ordered or decreed to contribute, it shall not exceed the amount fixed in the order or decree.

If there be an allotment for a wife or child, a former wife divorced and who has not remarried shall be entitled to a compulsory allotment only out of the difference, if any, between the allotment for the wife or child or both and one-half of the pay.

Sec. 202. That the enlisted man may allot any proportion or proportions or any fixed amount or amounts of his monthly pay or of the proportion thereof remaining after the compulsory allotment, for such purposes and for the benefit of such person or persons as he may direct, subject, however, to such conditions and limitations as may be prescribed under regulations to be made by the Secretary of War and the Secretary of the Navy, respectively.

Sec. 203. That in case one-half of an enlisted man's monthly pay is not allotted, regulations to be made by the Secretary of War and the Secretary of the Navy, respectively, may require, under such circumstances and conditions as may be prescribed in such regulations, that any proportion of such one-half pay as is not allotted shall be deposited to his credit, to be held during such period of his service as may be prescribed. Such deposits shall bear interest at the rate of four per centum per annum, with semiannual rests and, when payable, shall be paid principal and interest to the enlisted man, if living, otherwise to any beneficiary or beneficiaries he may have designated, or if there be no such beneficiary, then to the person or persons who would under the laws of the State of his residence be entitled to his personal property in case of intestacy.

Sec. 204. That a family allowance of not exceeding \$50 per month shall be granted and paid by the United States upon written application to the bureau by such enlisted man or by or on behalf of any prospective beneficiary, in accordance with and subject to the conditions, limitations, and exceptions hereinafter specified.

The family allowance shall be paid from the time of enlistment to death in or one month after discharge from the service, but not for more than one month after the termination of the present war emergency. No family allowance shall be made for any period preceding November first, nineteen hundred and seventeen. The payment shall be subject to such regulations as may be prescribed relative to cases of desertion and imprisonment and of missing men.

Subject to the conditions, limitations, and exceptions hereinabove and hereinafter specified, the family allowance payable per month shall be as follows:

Class A. In the case of a man, to his wife (including a former wife divorced) and to his child or children:

- (a) If there be a wife but no child, \$15.
- (b) If there be a wife and one child, \$25.
- (c) If there be a wife and two children, \$32.50, with \$5 per month additional for each additional child.
- (d) If there be no wife, but one child, \$5.
- (e) If there be no wife, but two children, \$12.50.
- (f) If there be no wife, but three children, \$20.
- (g) If there be no wife, but four children, \$30, with \$5 per month additional for each additional child.

Class B. In the case of a man or woman, to a grandchild, a parent, brother or sister:

- (a) If there be one parent, \$10.
 - (b) If there be two parents, \$20.
 - (c) For each grandchild, brother, sister, and additional parent, \$5.
- In the case of a woman, to a child or children:
- (d) If there be one child, \$5.
 - (e) If there be two children, \$12.50.
 - (f) If there be three children, \$20.
 - (g) If there be four children, \$30, with \$5 per month additional for each additional child.

Sec. 205. That family allowances for members of Class A shall be paid only if and while a compulsory allotment is made to a member or members of such class. The monthly family allowance to a former wife divorced shall be payable only out of the difference, if any, between the monthly family allowance to the other members of Class A and the sum of \$50, and only then if alimony shall have been decreed to her. For a wife living separate and apart under court order or written agreement or to a former wife divorced the monthly allowance, together with the allotment, if any, shall not exceed the amount specified in the court order, decree, or written agreement to be paid to her. For an illegitimate child, to whose support the father has been judicially ordered or decreed to contribute, it shall not exceed the amount fixed in the order or decree.

Sec. 206. That family allowances to members of Class B shall be granted only if and while the member is dependent in whole or in part on the enlisted man, and then only if and while the enlisted man makes a monthly allotment of his pay for such member or members equal to the amount of the monthly family allowance as hereinabove specified, except that—

- (a) The maximum monthly allotment so required to be made to members of Class B shall be one-half of his pay.
- (b) If he is making no allotment to a member of Class A, the minimum monthly allotment so designated to be made to members of Class B shall be \$15 per month.
- (c) If he is making the compulsory allotment to a member of Class A, the minimum monthly allotment so designated to be made to

members of Class B shall be one-seventh of his pay, but not less than \$5 per month.

On the enlisted man's application, or otherwise for good cause shown, exemption from this additional allotment under Class B as a condition to the allowance may be granted, upon such conditions as may be prescribed by regulations.

Sec. 207. That the amount of the family allowance to members of Class B shall be subject to each of the following limitations:

(a) If an allowance is paid to one or more beneficiaries of Class A, the total allowance to be paid to the beneficiaries of Class B shall not exceed the difference between the allowance paid to the beneficiaries of Class A and the sum of \$50.

(b) The total monthly allowance to beneficiaries of Class B added to the enlisted man's monthly allotment to them shall not exceed the average sum habitually contributed by him to their support monthly during the period of dependency but not exceeding a year immediately preceding his enlistment or the enactment of this amendatory Act.

Sec. 208. That as between the members of Class A and as between the members of Class B, the amount of the allotment and family allowance shall be apportioned as may be prescribed by regulations.

Sec. 209. The War and Navy Departments, respectively, shall pay over to the Treasury Department monthly the entire amount of such allotments for distribution to the beneficiaries, and the allotments and family allowances shall be paid by the bureau to or for the beneficiaries.

Sec. 210. That upon receipt of any application for family allowance the commissioner shall make all proper investigations and shall make an award, on the basis of which award the amount of the allotments to be made by the man shall be certified to the War Department or Navy Department, as may be proper. Whenever the commissioner shall have reason to believe that an allowance has been improperly made or that the conditions have changed, he shall investigate or re-investigate and may modify the award. The amount of each monthly allotment and allowance shall be determined according to the conditions then existing.

ARTICLE III.

COMPENSATION FOR DEATH OR DISABILITY.

Sec. 300. That for death or disability resulting from personal injury suffered or disease contracted in the line of duty, by any commissioned officer or enlisted man or by any member of the Army Nurse Corps (female) or of the Navy Nurse Corps (female) when employed in the active service under the War Department or Navy Department, the United States shall pay compensation as hereinafter provided; but no compensation shall be paid if the injury or disease has been caused by his own willful misconduct.

Sec. 301. That if death results from injury—

If the deceased leaves a widow or child, or if he leaves a widowed mother dependent upon him for support, the monthly compensation shall be the following amounts:

- (a) For a widow alone, \$25.
- (b) For a widow and one child, \$35.
- (c) For a widow and two children, \$47.50, with \$5 for each additional child up to two.
- (d) If there be no widow, then for one child, \$20.
- (e) For two children, \$30.
- (f) For three children, \$40, with \$5 for each additional child up to two.

(g) For a widowed mother, \$20. The amount payable under this subdivision shall not be greater than a sum which, when added to the total amount payable to the widow and children, does not exceed \$75. This compensation shall be payable for the death of but one child, and no compensation for the death of a child shall be payable if such widowed mother is in receipt of compensation under the provisions of this article for the death of her husband. Such compensation shall be payable whether her widowhood arises before or after the death of the person and whenever her condition is such that if the person were living the widowed mother would have been dependent upon him for support.

If the death occur before discharge or resignation from service, the United States shall pay for burial expenses and the return of body to his home a sum not to exceed \$100, as may be fixed by regulations.

The payment of compensation to a widow or widowed mother shall continue until her death or remarriage.

The payment of compensation to or for a child shall continue until such child reaches the age of eighteen years or marries, or if such child be incapable, because of insanity, idiocy, or being otherwise permanently helpless, then during such incapacity.

Whenever the compensation payable to or for the benefit of any person under the provisions of this section is terminated by the happening of the contingency upon which it is limited, the compensation thereafter for the remaining beneficiary or beneficiaries, if any, shall be the amount which would have been payable to them if they had been the sole original beneficiaries.

As between the widow and the children not in her custody, and as between children, the amount of the compensation shall be apportioned as may be prescribed by regulations. The word "widow" as used in this section shall not include one who shall have married the deceased later than ten years after the time of injury.

Sec. 302. That if disability results from the injury—

(1) If and while the disability is total, the monthly compensation shall be the following amounts:

- (a) If he has neither wife nor child living, \$30.
- (b) If he has a wife but no child living, \$45.
- (c) If he has a wife and one child living, \$55.
- (d) If he has a wife and two children living, \$65.
- (e) If he has a wife and three or more children living, \$75.
- (f) If he has no wife but one child living, \$40, with \$10 for each additional child up to two.
- (g) If he has a widowed mother dependent on him for support, then, in addition to the above amounts, \$10.

To an injured person who is totally disabled and in addition so helpless as to be in constant need of a nurse or attendant, such additional sum shall be paid, but not exceeding \$20 per month, as the director may deem reasonable: Provided, however, That for the loss of both feet or both hands or both eyes, or for becoming totally blind or helplessly and permanently bedridden from causes occurring in the line of duty in the service of the United States, the rate of compensation shall be \$100 per month: Provided further, That no allowance shall be made for nurse or attendant.

(2) If and while the disability is partial, the monthly compensation shall be a percentage of the compensation that would be payable for his total disability, equal to the degree of the reduction in earning capacity resulting from the disability, but no compensation shall be payable for a reduction in earning capacity rated at less than ten per centum.

A schedule of ratings of reductions in earning capacity from specific injuries or combinations of injuries of a permanent nature shall be adopted and applied by the bureau. Ratings may be as high as one hundred per centum. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations and not upon the impairment in earning capacity in each individual case, so that there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of a permanent injury. The bureau shall from time to time readjust this schedule of ratings in accordance with actual experience.

(3) In addition to the compensation above provided, the injured person shall be furnished by the United States such reasonable governmental medical, surgical, and hospital services and with such supplies, including artificial limbs, trusses, and similar appliances, as the director may determine to be useful and reasonably necessary: Provided, That nothing in this Act shall be construed to affect the necessary military control over any member of the military or naval establishments before he shall have been discharged from the military or naval service.

(4) The amount of each monthly payment shall be determined according to the family conditions then existing.

Sec. 303. That every person applying for or in receipt of compensation for disability under the provisions of this article shall, as frequently and at such times and places as may be reasonably required, submit himself to examination by a medical officer of the United States or by a duly qualified physician designated or approved by the director. He may have a duly qualified physician designated and paid by him present to participate in such examination. For all examinations he shall, in the discretion of the director, be paid his reasonable traveling and other expenses and also loss of wages incurred in order to submit to such examination. If he refuses to submit himself for, or in any way obstructs, any examination, his right to claim compensation under this article shall be suspended until such refusal or obstruction ceases. No compensation shall be pay-

able while such refusal or obstruction continues, and no compensation shall be payable for the intervening period.

Every person in receipt of compensation for disability shall submit to any reasonable medical or surgical treatment furnished by the bureau whenever requested by the bureau; and the consequences of unreasonable refusal to submit to any such treatment shall not be deemed to result from the injury compensated for.

Sec. 304. That in cases of dismemberment, of injuries to sight or hearing, and of other injuries commonly causing permanent disability, the injured person shall follow such course or courses of rehabilitation, reeducation, and vocational training as the United States may provide or procure to be provided. Should such course prevent the injured person from following a substantially gainful occupation while taking same, a form of enlistment may be required which shall bring the injured person into the military or naval service. Such enlistment shall entitle the person to full pay as during the last month of his active service, and his family to family allowances and allotment as hereinbefore provided, in lieu of all other compensation for the time being.

In case of his willful failure properly to follow such course or so to enlist, payment of compensation shall be suspended until such willful failure ceases and no compensation shall be payable for the intervening period.

Sec. 305. That upon its own motion or upon application the bureau may at any time review an award, and, in accordance with the facts found upon such review, may end, diminish, or increase the compensation previously awarded, or, if compensation has been refused or discontinued, may award compensation.

Sec. 306. That no compensation shall be payable for death or disability which does not occur prior to or within one year after discharge or resignation from the service, except that where, after a medical examination made pursuant to regulations, at the time of discharge or resignation from the service, or within such reasonable time thereafter, not exceeding one year, as may be allowed by regulations, a certificate has been obtained from the director to the effect that the injured person at the time of his discharge or resignation was suffering from injury likely to result in death or disability, compensation shall be payable for death or disability, whenever occurring, proximately resulting from such injury.

Sec. 307. That compensation shall not be payable for death in the course of the service until the death be officially recorded in the department under which he may be serving. No compensation shall be payable for a period during which the man has been reported "missing" and a family allowance has been paid for him under the provisions of Article II.

Sec. 308. That no compensation shall be payable for death inflicted as a lawful punishment for a crime or military offense except when inflicted by the enemy. A dismissal or dishonorable or bad conduct discharge from the service shall bar and terminate all right to any compensation under the provisions of this article.

Sec. 309. That no compensation shall be payable unless a claim

therefor be filed, in case of disability, within five years after discharge or resignation from the service, or, in case of death during the service, within five years after such death is officially recorded in the department under which he may be serving: Provided, however, That where compensation is payable for death or disability occurring after discharge or resignation from the service, claim must be made within five years after such death or the beginning of such disability.

The time herein provided may be extended by the director not to exceed one year for good cause shown. If at the time that any right accrues to any person under the provisions of this article, such person is a minor, or is of unsound mind or physically unable to make a claim, the time herein provided shall not begin to run until such disability ceases.

Sec. 310. That no compensation shall be payable for any period more than two years prior to the date of claim therefor, nor shall increased compensation be awarded to revert back more than one year prior to the date of claim therefor.

Sec. 311. That compensation under this article shall not be assignable, and shall be exempt from attachment and execution and from all taxation.

Sec. 312. That compensation under this article shall not be paid while the person is in receipt of service or retirement pay. The laws providing for gratuities or payments in the event of death in the service and existing pension laws shall not be applicable after the enactment of this amendment to persons now in or hereafter entering the military or naval service, or to their widows, children, or their dependents, except in so far as rights under any such law shall have heretofore accrued.

Compensation because of disability or death of members of the Army Nurse Corps (female) or of the Navy Nurse Corps (female) shall be in lieu of any compensation for such disability or death under the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," approved September seventh, nineteen hundred and sixteen.

Sec. 313. That if an injury or death for which compensation is payable under this amendatory Act is caused under circumstances creating a legal liability upon some person other than the United States or the enemy to pay damages therefor, the director, as a condition to payment of compensation by the United States, shall require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person. The cause of action so assigned to the United States may be prosecuted or compromised by the director and any money realized thereon shall be placed to the credit of the compensation fund.

Sec. 314. That from and after the passage of this Act the rate of pension for a widow of an officer or enlisted man of the Army, Navy, or Marine Corps of the United States who served in the Civil War, the War with Spain, or the Philippine Insurrection, now on the pen-

sion roll or hereafter to be placed on the pension roll, and entitled to receive a less rate than hereinafter provided, shall be \$25 per month; and nothing herein shall be construed to affect the additional allowance provided by existing pension laws on account of a helpless child or child under sixteen years of age: Provided, however, That this Act shall not be so construed as to reduce any pension under any Act, public or private: And provided further, That the provisions of this section shall be administered, executed, and enforced by the Commissioner of Pensions.

ARTICLE IV.

INSURANCE.

Sec. 400. That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of \$500, and not less than \$1,000 or more than \$10,000, upon the payment of the premiums as hereinafter provided.

Sec. 401. That such insurance must be applied for within one hundred and twenty days after enlistment or after entrance into or employment in the active service and before discharge or resignation, except that those persons who are in the active war service at the time of the publication of the terms and conditions of such contract of insurance may apply at any time within one hundred and twenty days thereafter and while in such service. Any person in the active service on or after the sixth day of April, nineteen hundred and seventeen, who, while in such service and before the expiration of one hundred and twenty days from and after such publication, becomes or has become totally and permanently disabled or dies, or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of \$25 each. If he shall die either before he shall have received any of such monthly installments or before he shall have received two hundred and forty of such monthly installments, then \$25 per month shall be paid to his wife from the time of his death and during her widowhood, or to his child, or widowed mother if and while they survive him: Provided, however, That not more than two hundred and forty of such monthly installments, including those received by such person during his total and permanent disability, shall be so paid; and in that event the amount of the monthly installments shall be apportioned between them as may be provided by regulations.

Sec. 402. That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. The insurance shall not be assignable, and shall not be

subject to the claims of creditors of the insured or of the beneficiary. It shall be payable only to a spouse, child, grandchild, parent, brother or sister, and also during total and permanent disability to the injured person, or to any or all of them. The insurance shall be payable in two hundred and forty equal monthly installments. Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid-up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. All calculations shall be based upon the American Experience Table of Mortality and interest at three and one-half per centum per annum, except that no deduction shall be made for continuous installments during the life of the insured in case his total and permanent disability continues more than two hundred and forty months. Subject to regulations, the insured shall at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries, but only within the classes herein provided. If no beneficiary within the permitted class be designated by the insured, either in his lifetime or by his last will and testament, or if the designated beneficiary does not survive the insured, the insurance shall be payable to such person or persons, within the permitted class of beneficiaries as would under the laws of the State of the residence of the insured, be entitled to his personal property in case of intestacy. If no such person survive the insured, then there shall be paid to the estate of the insured an amount equal to the reserve value, if any, of the insurance at the time of his death, calculated on the basis of the American experience Table of Mortality and three and one-half per centum interest in full of all obligations under the contract of insurance.

Sec. 403. That the United States shall bear the expenses of administration and the excess mortality and disability cost resulting from the hazards of war. The premium rates shall be the net rates based upon the American Experience Table of Mortality and interest at three and one-half per centum per annum.

Sec. 404. That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms of one year each. Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty payment life, endowment maturing at age sixty-two and into other usual forms of insurance and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each and may be deducted from the pay or deposit of the insured or be otherwise made at his election.

Sec. 405. That in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder, an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides. The court, as part of its judgment, shall determine and allow such reasonable attorney's fees, not to exceed ten per centum of the amount recovered, to be paid by the claimant on behalf of whom such proceedings are instituted to his attorney; and it shall be unlawful for the attorney or for any other person acting as claim agent or otherwise to ask for, contract for, or receive any other compensation because of such action. No other compensation or fee shall be charged or received by any person except such as may be authorized by the commissioner in regulations to be promulgated by him. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall, for each and every such offense, be fined not exceeding \$500, or be imprisoned at hard labor not exceeding two years, or both, in the discretion of the court.

Sec. 3. That section eight of the Act entitled "An act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen, shall be held and construed to authorize the President, in accordance with the provisions of said Act and for the period of the existing emergency only, to appoint as generals the Chief of Staff and the commander of the United States forces in France; and as lieutenant general each commander of an army or army corps organized as authorized by existing law: Provided, That the pay of the grades of general and lieutenant general shall be \$10,000 and \$9,000 a year, respectively, with allowances appropriate to said grades as determined by the Secretary of War: And provided, That brigadier generals of the Army shall hereafter rank relatively with rear admirals of the lower half of the grade. And, hereafter, the chief of any existing staff corps, department, or bureau, except as is otherwise provided for the Chief of Staff, shall have the rank, pay, and allowances of major general.

Approved, October 6, 1917.

[Public Resolution—No. 27—65th Congress. S. J. Res. 133.]

Joint Resolution Authorizing the granting of insurance under the Act entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department," approved September second, nineteen hundred and fourteen, as amended by the Act approved October sixth, nineteen hundred and seventeen, on application by a person other than the person to be insured. [April 2, 1918].

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That insurance under the Act entitled "An Act to authorize the establishment of a Bureau of

War Risk Insurance in the Treasury Department," approved September second, nineteen hundred and fourteen, as amended by the Act approved October sixth, nineteen hundred and seventeen, shall be granted by the Bureau of War Risk Insurance on application made by the person to be insured or, subject to such regulations as the bureau may prescribe, by any person within the permitted class as specified in section four hundred and two of said Act: Provided, That the person to be insured has been taken a prisoner of war before April twelfth, nineteen hundred and eighteen: And provided further, That no one but the insured may designate a beneficiary, and nothing in this resolution shall be deemed to change or affect the permitted class of beneficiaries or impose any obligation on the insured against his will.

Approved, April 2, 1918.

[Public—No. 151—65th Congress. H. R. 11245.]

An Act to amend an Act entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department," approved September second, nineteen hundred and fourteen, and an Act in amendment thereto, approved October sixth, nineteen hundred and seventeen. [May 20, 1918.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section thirteen, article one, of the Act approved October sixth, nineteen hundred and seventeen, entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department," be, and is hereby amended by striking out the following words in the last sentence: "to regulate the matter of compensation, if any, but in no case to exceed ten per centum, to be paid to claim agents and attorneys for services in connection with any of the matters provided for in articles two, three, and four," and insert at the end of the sentence the following words: "Provided, however, That payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers shall not exceed \$3 in any one case: And provided further, That no claim agent or attorney shall be recognized in the presentation or adjudication of claims under articles two, three, and four, except that in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder, an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides, and that whenever judgment shall be rendered in an action brought pursuant to this provision, the court, as part of its judgment, shall determine and allow such reasonable attorney's fees, not to exceed five per centum of the amount recovered, to be paid by the claimant in behalf of whom such proceedings were instituted, to his attorney.

"Any person who shall directly or indirectly solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive, any fee or compensation, except as herein provided, shall be

guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than \$500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment," so that the section as amended shall read as follows:

Sec. 13. That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in section five. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director, subject to the general direction of the Secretary of the Treasury. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment, compensation, or insurance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards: Provided, however, That payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers shall not exceed \$3 in any one case: And provided further, That no claim agent or attorney shall be recognized in the presentation or adjudication of claims under articles two, three, and four, except that in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides, and that whenever judgment shall be rendered in an action brought pursuant to this provision the court, as part of its judgment, shall determine and allow such reasonable attorney's fees, not to exceed five per centum of the amount recovered, to be paid by the claimant in behalf of whom such proceedings were instituted to his attorney, said fee to be paid out of the payments to be made to the beneficiary under the judgment rendered at a rate not exceeding one-tenth of each of such payments until paid.

"Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than \$500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment."

Sec. 2. That Article IV of said Act, approved October sixth, nineteen hundred and seventeen, entitled "An Act to authorize the estab-

lishment of a Bureau of War Risk Insurance in the Treasury Department," is hereby amended by striking out section four hundred and five thereof.

Approved May 20, 1918.

[Public—No. 175—65th Congress. S. 4482.]

An Act to amend an Act entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department," approved September second, nineteen hundred and fourteen, as amended. [June 25, 1918.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the second subdivision (4) of section twenty-two of the Act entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury department," approved September second, nineteen hundred and fourteen, as amended, relating to the definition of the term "parent," is hereby amended to read as follows:

"(4) The term 'parent' includes a father, mother, grandfather, grandmother, father through adoption, mother through adoption, stepfather, and stepmother, either of the person in the service or of the spouse."

Sec. 2. That four new sections are hereby added to Article I of said Act, to be known as sections twenty-seven, twenty-eight, twenty-nine, and thirty, respectively, and to read as follows:

"Sec. 27. That whoever shall obtain or receive any money, check, allotment, family allowance, compensation, or insurance under Articles II, III, or IV of this Act, without being entitled thereto, with intent to defraud the United States or any person in the military or naval forces of the United States, shall be punished by a fine of not more than \$2,000, or by imprisonment for not more than one year, or both.

"Sec. 28. That the allotments and family allowances, compensation, and insurance payable under Articles II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Articles II, III, or IV; and shall be exempt from all taxation: Provided, That such allotments and family allowances, compensation, and insurance shall be subject to any claims which the United States may have, under Articles II, III, and IV, against the person on whose account the allotments and family allowances, compensation, or insurance is payable.

"Sec. 29. That the discharge or dismissal of any person from the military or naval forces on the ground that he is an enemy alien, conscientious objector, or a deserter, or as guilty of mutiny, treason, spying, or any offense involving moral turpitude, or willful and persistent misconduct shall terminate any insurance granted on the life of such person under the provisions of Article IV, and shall bar all rights to any compensation under Article III or any insurance under Article IV.

"Sec. 30. That this Act may be cited as the war-risk insurance Act."

Sec. 3. That section two hundred of said Act is hereby amended to read as follows:

"Sec. 200. That the provisions of this article shall apply to all enlisted men in the military or naval forces of the United States, except the Philippine Scouts, the insular force of the Navy, and, the Samoan native guard and band of the Navy."

Sec. 4. That the second and third paragraphs of section two hundred and one of said Act are hereby amended to read as follows:

"The monthly compulsory allotment shall be \$15. For a wife living separate and apart from her husband under court order or written agreement, or for a former wife divorced, the monthly compulsory allotment shall not exceed the amount specified in the court order, decree, or written agreement to be paid to her, and for an illegitimate child, to whose support the father has been judicially ordered or decreed to contribute, it shall not exceed the amount fixed in the order or decree.

"If there is a compulsory allotment for a wife or child, then a former wife divorced who has not remarried and to whom alimony has been decreed, shall not be entitled to a compulsory allotment, but shall be entitled to a family allowance as hereinafter provided."

Sec. 5. That section two hundred and three of said Act is hereby amended to read as follows:

"Sec. 203. That in case one-half of an enlisted man's monthly pay is not allotted, regulations to be made by the Secretary of War and the Secretary of the Navy, respectively, may require, under circumstances and conditions as may be prescribed in such regulations, that any proportion of such one-half pay as is not allotted shall be deposited to his credit, to be held during such period of his service as may be prescribed. Such deposit shall bear interest at the same rate as United States bonds bear for the same period, and, when payable, shall be paid principal and interest to the enlisted man, if living, otherwise to any beneficiary or beneficiaries he may have designated, or if there be no such beneficiary, then to the person or persons who, under the laws of the State of his residence, would be entitled to his personal property in case of intestacy."

Sec. 6. That the third and fourth paragraphs of section two hundred and four of said Act are hereby amended to read as follows:

"Class A. In the case of a man to his wife (including a former wife divorced) and to his child or children—

"(a) If there is a wife but no child, \$15;

"(b) If there is a wife and one child, \$25;

"(c) If there is a wife and two children, \$32.50, with \$5 per month additional for each additional child;

"(d) If there is no wife, but one child, \$5;

"(e) If there is no wife, but two children, \$12.50;

"(f) If there is no wife, but three children, \$20;

"(g) If there is no wife, but four children, \$30, with \$5 per month additional for each additional child;

"(h) If there is a former wife divorced who has not remarried and to whom alimony has been decreed, \$15.

"Class B. In the case of a man or woman to a grandchild, a parent, brother, or sister—

"(a) If there is one parent, \$10;

"(b) If there are two parents, \$20;

"(c) If there is a grandchild, brother, sister, or additional parent, \$5 for each.

"In the case of a woman, the family allowances for a husband and children shall be in the same amounts, respectively, as are payable, in the case of a man, to a wife and children, provided she makes a voluntary allotment of \$15 as a basis therefor, and provided, further, that dependency exists as required in section two hundred and six."

Sec. 7. That section two hundred and six of said Act is hereby amended to read as follows:

"Sec. 206. That family allowances to members of class B shall be paid only if and while the members are dependent in whole or in part on the enlisted man, and then only if and while the enlisted man makes a monthly allotment of his pay for such members in the following amounts:

"(a) If an enlisted man is not making a compulsory allotment for class A the allotment for class B required as a condition to the family allowance shall be \$15;

"(b) If an enlisted man is making a compulsory allotment for class A the additional allotment for class B required as a condition to the family allowance shall be \$5, or if a woman is making an allotment of \$15 for a dependent husband or child the additional allotment for the other members of class B required as a condition to the family allowance shall be \$5."

Sec. 8. That section two hundred and ten of said Act is hereby amended to read as follows:

"Sec. 210. That upon receipt of any application for family allowance, the commissioner shall make all proper investigations and shall make an award, on the basis of which award the amount of the allotments to be made by the man shall be certified to the War Department or Navy Department, as may be proper. Whenever the commissioner shall have reason to believe that an allowance has been improperly made or that the conditions have changed, he shall investigate or reinvestigate and may modify the award. The amount of each monthly allotment and allowance shall be determined according to the family conditions existing on the first day of the month."

Sec. 9. That sections four, six, seven, and eight of this Act shall take effect on the first day of July, nineteen hundred and eighteen.

Sec. 10. That section three hundred of said Act is hereby amended to read as follows:

"Sec. 300. That for death or disability resulting from personal injury suffered or disease contracted in the line of duty, by any commissioned officer or enlisted man or by any member of the Army Nurse Corps (female) or of the Navy Nurse Corps (female) when employed in the active service under the War Department or Navy Department, the United States shall pay compensation as hereinafter provided; but no compensation shall be paid if the injury or disease

has been caused by his own willful misconduct: Provided, That for the purposes of this section said officer, enlisted man, or other member shall be held and taken to have been in sound condition when examined, accepted, and enrolled for service: Provided further, That this section, as amended, shall be deemed to become effective as of October sixth, nineteen hundred and seventeen."

Sec. 11. That section three hundred and one of said Act is hereby amended to read as follows:

"Sec. 301. That if death results from injury—

"If the deceased leaves a widow or child, or if he leaves a mother or father, either or both dependent upon him for support, the monthly compensation shall be the following amounts:

"(a) If there is a widow but no child, \$25;

"(b) If there is a widow and one child, \$35;

"(c) If there is a widow and two children, \$42.50, with \$5 for each additional child up to two;

"(d) If there is no widow, but one child, \$20;

"(e) If there is no widow, but two children, \$30;

"(f) If there is no widow, but three children, \$40, with \$5 for each additional child up to two;

"(g) If there is a dependent mother (or dependent father), \$20, or both, \$30. The amount payable under this subdivision shall not exceed the difference between the total amount payable to the widow and children and the sum of \$75. This compensation shall be payable for the death of but one child, and no compensation for the death of a child shall be payable if the dependent mother is in receipt of compensation under the provisions of this article for the death of her husband. Such compensation shall be payable whether the dependency of the father or mother or both arises before or after the death of the person, but no compensation shall be payable if the dependency arises more than five years after the death of the person.

"If the death occurs before discharge or resignation from service, the United States shall pay for burial expenses and the return of the body to his home a sum not to exceed \$100, as may be fixed by regulations.

"The payment of compensation to a widow shall continue until her death or remarriage.

"The payment of compensation to or for a child shall continue until such child reaches the age of eighteen years or marries, or if such child be incapable, because of insanity, idiocy, or being otherwise permanently helpless, then during such incapacity.

"Whenever the compensation payable to or for the benefit of any person under the provisions of this section is terminated by the happening of the contingency upon which it is limited, the compensation thereafter for the remaining beneficiary or beneficiaries, if any shall be the amount which would have been payable to them if they had been the sole original beneficiaries.

"As between the widow and the children not in her custody, and as between children, the amount of the compensation shall be apportioned as may be prescribed by regulation.

"The term 'widow' as used in this section shall not include one who

shall have married the deceased later than ten years after the time of injury, and shall include a widower, whenever his condition is such that, if the deceased person were living, he would have been dependent upon her for support."

Sec. 12. That subdivision (1) of section three hundred and two of said Act is hereby amended to read as follows:

"(1) If and while the disability is total, the monthly compensation shall be the following amounts:

"(a) If the disabled person has neither wife nor child living, \$30;

"(b) If he has a wife but no child living, \$45;

"(c) If he has a wife and one child living, \$55;

"(d) If he has a wife and two children living, \$65;

"(e) If he has a wife and three or more children living, \$75;

"(f) If he has no wife but one child living, \$40, with \$10 for each additional child up to two;

"(g) If he has a mother or father, either or both dependent on him for support, then in addition to the above amounts, \$10 for each;

"(h) If he is totally disabled and in addition so helpless as to be in constant need of a nurse or attendant, such additional sum shall be paid, but not exceeding \$20 per month, as the director may deem reasonable: Provided, however, That for the loss of both feet or both hands or both eyes, or for becoming totally blind or becoming helpless and permanently bedridden from causes occurring in the line of duty in the service of the United States, the rate of compensation shall be \$100 per month: Provided further, That where the rate of compensation is \$100 per month, no allowance shall be made for a nurse or attendant."

Sec. 13. That subdivision (4) of section three hundred and two of said Act is hereby amended to read as follows:

"(4) The amount of each monthly payment shall be determined according to the family conditions existing on the first day of the month."

Sec. 14. That two new subdivisions are hereby added to section three hundred and two of said Act, to be known as subdivisions (5) and (6), respectively, and to read as follows:

"(5) Where the disabled person and his wife are not living together, or where the children are not in the custody of the disabled person, the amount of the compensation shall be apportioned as may be prescribed by regulations.

"(6) The term 'wife' as used in this section shall include 'husband' if the husband is dependent upon the wife for support."

Sec. 15. That where section three hundred and one of said Act is amended by striking out the provisions that a mother is entitled to compensation only when she is widowed and substitute provisions are included to the effect that compensation is payable to a dependent mother or dependent father, such substitute provisions shall be deemed to be in effect as of October sixth, nineteen hundred and seventeen.

Sec. 16. That section three hundred and eleven of said Act is hereby repealed.

Sec. 17. That section three hundred and twelve of said Act is hereby amended to read as follows:

"Sec. 312. That compensation under this article shall not be paid while the person is in receipt of service or retirement pay. The laws providing for gratuities or payments in the event of death in the service and existing pension laws shall not be applicable after the enactment of this amendment to any person in the active military or naval service on the sixth day of October, nineteen hundred and seventeen, or who thereafter entered the active military or naval service, or to their widows, children, or their dependents, except in so far as rights under any such law have heretofore accrued.

"Compensation because of disability or death of members of the Army Nurse Corps (female) or of the Navy Nurse Corps (female) shall be in lieu of any compensation for such disability or death under the Act entitled 'An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes,' approved September seventh, nineteen hundred and sixteen."

Sec. 18. That section three hundred and thirteen of said Act is hereby amended to read as follows:

"Sec. 313. (1) That if an injury or death for which compensation is payable under this article is caused under circumstances creating a legal liability upon some person other than the United States or the enemy to pay damages therefor, the director, as a condition to payment of compensation by the United States, may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person, or if it appears to be for the best interests of the beneficiary the director may require him to prosecute the said action in his own name, subject to regulations. The director may require such assignment or prosecution at any time after the injury or death, and the failure on the part of the beneficiary to so assign or to prosecute said cause of action in his own name within a reasonable time, to be fixed by the director, shall bar any right to compensation on account of the same injury or death. The cause of action so assigned to the United States may be prosecuted or compromised by the director, and any money realized or collected thereon, less the reasonable expenses of such realization or collection, shall be placed to the credit of the military and naval compensation appropriation. If the amount placed to the credit of such appropriation in such case is in excess of the amount of the award of compensation, if any, such excess shall be paid to the beneficiary after any compensation award for the same injury or death is made.

"If a beneficiary or conditional beneficiary shall have recovered, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such money or other property so recovered shall be credited upon any compensation payable, or which may become payable, to such beneficiary, or conditional beneficiary by the United States on account of the same injury or death.

"(2) If an injury or death for which compensation may be payable under this article is caused under circumstances creating a legal liability upon some person, other than the United States or the enemy, to pay damages therefor, then, in order to preserve the right of action the director may require the conditional beneficiary at any time after the injury or death, to assign such right of action to the United States, or, if it appears to be for the best interests of such conditional beneficiary, to prosecute the said cause of action in his own name, subject to regulations. The failure on the part of the beneficiary to so assign or to prosecute the said cause of action in his own name within a reasonable time, to be fixed by the director, shall bar any right to compensation on account of the same injury or death. The cause of action so assigned may be prosecuted or compromised by the director, and any money realized or collected thereon, less the reasonable expenses of such realization or collection, shall be paid to such beneficiary, and be credited upon any future compensation which may become payable to such beneficiary by the United States on account of the same injury or death.

"(3) The bureau shall make all necessary regulations for carrying out the purposes of this section. For the purposes of computation only under this section the total amount of compensation due any beneficiary shall be deemed to be equivalent to a lump sum equal to the present value of all future payments of compensation computed as of the date of the award of compensation at four per centum, true discount, compounded annually. The probability of the beneficiary's death before the expiration of the period during which he is entitled to compensation shall be determined according to the American Experience Table of Mortality.

"A conditional beneficiary is any person who may become entitled to compensation under this article on or after the death of the injured person.

"Nothing in this section shall be construed to impose any administrative duties upon the War or Navy Departments."

Sec. 19. That section four hundred and one of said Act is hereby amended to read as follows:

"Sec. 401. That such insurance must be applied for within one hundred and twenty days after enlistment or after entrance into or employment in the active service and before discharge or resignation, except that those persons who are in the active war service at the time of the publication of the terms and conditions of such contract of insurance may apply at any time within one hundred and twenty days thereafter and while in such service. Any person in the active service on or after the sixth day of April, nineteen hundred and seventeen, who, while in such service and before the expiration of one hundred and twenty days from and after such publication, becomes or has become totally and permanently disabled, or dies, or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of \$25 each. If he shall die either before he shall have received any of such monthly installments or before he shall have received two hundred and forty of such

monthly installments, then \$25 per month shall be paid to his widow from the time of his death and during her widowhood, or if there is no widow surviving him, then to his child or children, or if there is no child surviving him, then to his mother, or if there is no mother surviving him, then to his father, if and while they survive him: Provided however, That not more than two hundred and forty of such monthly installments including those received by such person during his total and permanent disability, shall be so paid. The amount of the monthly installments shall be apportioned between children as may be provided by regulations."

Sec. 20. That section nineteen of this Act amending section four hundred and one of the Act entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department," approved September second, nineteen hundred and fourteen, as amended, shall be deemed to be in effect as of October sixth, nineteen hundred and seventeen: Provided, That nothing herein shall be construed to interfere with the payment of monthly installments, authorized to be made under the provisions of said section four hundred and one as originally enacted, for the months up to and including June, nineteen hundred and eighteen: Provided further, That all awards of automatic insurance under the provisions of said section four hundred and one as originally enacted shall be revised as of the first day of July, nineteen hundred and eighteen, in accordance with the provisions of said section four hundred and one as amended by section nineteen of this Act.

Sec. 21. That section four hundred and two of said Act is hereby amended to read as follows:

"Sec. 402. That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. The insurance shall be payable only to a spouse, child, grandchild, parent, brother; or sister, and also during total and permanent disability to the injured person, or to any or all of them. The insurance shall be payable in two hundred and forty equal monthly installments. Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. All calculations shall be based upon the American Experience Table of Mortality and interest at three and one-half per centum per annum, except that no deduction shall be made for continuous installments during the life of the insured in case his total and permanent disability continues more than two hundred and forty months. Subject to regulations, the insured shall at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries, but only within the classes herein provided. If no beneficiary within the permitted class be designated by the insured, either in his lifetime or by his last will and testament,

or if the designated beneficiary does not survive the insured, the insurance shall be payable to such person or persons within the permitted class of beneficiaries as would under the laws of the State of the residence of the insured be entitled to his personal property in case of intestacy. If no such person survive the insured, then there shall be paid to the estate of the insured an amount equal to the reserve value, if any, of the insurance at the time of his death, calculated on the basis of the American Experience Table of Mortality and three and one-half per centum interest in full of all obligations under the contract of insurance."

Approved, June 25, 1918.

[Public—No. 195—65th Congress. H. R. 11048.]

An Act to amend the war-risk insurance Act. [July 11, 1918.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the war-risk insurance Act is hereby amended by adding to such Act a new section, to be known as section two b, to read as follows:

"Sec. 2b. That when it appears to the Secretary of the Treasury that vessels of foreign friendly flags, or their masters, officers, or crews, or shippers or importers in such vessels, are unable in any trade to secure adequate war-risk insurance on reasonable terms, the Bureau of War Risk Insurance, with the approval of the Secretary, is hereby authorized to make provisions for the insurance by the United States of (1) such vessels of foreign friendly flags, their freight and passage moneys, and personal effects of the masters, officers, and crews thereof against the risks of war when such vessels are chartered or operated by the United States Shipping Board or its agent, or chartered by any person a citizen of the United States, and (2) the cargoes to be shipped in such vessels of foreign friendly flags, whether or not they are so chartered. Such insurance on the vessel, however, is authorized only when the United States Shipping Board or its agent operates the vessel or the charterers are, by the terms of the charter party or contract with the vessel owners, required to assume the war risk or provide insurance protecting the vessel owners against war risk during the term of the charter or hire of the vessel.

"The Bureau of War Risk Insurance, with the approval of the Secretary of the Treasury, is also hereby authorized to insure the masters, officers, and crews of vessels operated or chartered as aforesaid against the loss of life or personal injury by the risk of war and for compensation during the detention following capture by enemies of the United States, whenever it appears to the Secretary that the owners, operators, or charterers of such vessels are unable, in any trade, to secure such insurance on reasonable terms."

Sec. 2. That section five of the war-risk insurance Act is hereby amended to read as follows:

"Sec. 5. That the Secretary of the Treasury is authorized to establish an advisory board, to consist of three members skilled in the practices of war-risk insurance, for the purpose of assisting the Bureau of War Risk Insurance in fixing rates of premium and in adjust-

ment of claims for losses, and generally in carrying out the purposes of this Act; the compensation of the members of said board to be determined by the Secretary of the Treasury, but not to exceed \$20 a day each while actually employed. He is likewise authorized to appoint two persons skilled in the practice of accident insurance for the purpose of assisting the Bureau of War Risk Insurance in the adjustment of claims for death, personal injury, or detention; the compensation of persons so appointed to be determined by the Secretary of the Treasury, but not to exceed \$20 a day each while actually employed. In the event of disagreement as to the claim for losses, or amount thereof, between the said bureau and the parties to such contract of insurance, an action on the claim may be brought against the United States in the district court of the United States, sitting in admiralty, in the district in which the claimant or his agents may reside. The Secretary of the Treasury is, in his judgment, authorized to compromise the claim either before or after the institution of an action therein."

Sec. 3. That section nine of the war-risk insurance Act is hereby amended to read as follows:

"Sec. 9. That the President is authorized whenever in his judgment the necessity of further war insurance by the United States shall have ceased to exist to suspend the operation of this Act, in so far as the Division of Marine and Seamen's Insurance is concerned, which suspension shall be made in any event within six months after the end of the war, but shall not affect any insurance outstanding at the time or any claims pending adjustment. For the purpose of the final adjustment of any such outstanding insurance or claims, the Division of Marine and Seamen's Insurance may, in the discretion of the President, be continued in existence for a period not exceeding three years after such suspension.

"The words 'end of the war' as used herein shall be deemed to mean the date of proclamation of exchange of ratification of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the 'end of the war' within the meaning of this Act."

Approved, July 11, 1918.

14. TRADING WITH THE ENEMY ACT

[Public—No. 91—65th Congress. H. R. 4960.]

An Act to define, regulate, and punish trading with the enemy, and for other purposes. [October 6, 1917.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act shall be known as the "Trading with the Enemy Act."

Sec. 2. That the word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing busi-

ness within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

The words "ally of enemy," as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy."

The word "person," as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic.

The words "United States," as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or occupied by the military or naval forces thereof.

The words "the beginning of the war," as used herein, shall be deemed to mean midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war.

The words "end of the war," as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the "end of the war" within the meaning of this Act.

The words "bank or banks," as used herein, shall be deemed to

mean and include national banks, State banks, trust companies, or other banks or banking associations doing business under the laws of the United States, or of any State of the United States.

The words "to trade," as used herein, shall be deemed to mean—

(a) Pay, satisfy, compromise, or give security for the payment or satisfaction of any debt or obligation.

(b) Draw, accept, pay, present for acceptance or payment, or indorse any negotiable instrument or chose in action.

(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

(d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign, or otherwise dispose of, or receive any form of property.

(e) To have any form of business or commercial communication or intercourse with.

Sec. 3. That it shall be unlawful—

✓ (a) For any person in the United States, except with the license of the President, granted to such person, or to the enemy, or ally of enemy, as provided in this Act, to trade, or attempt to trade, either directly or indirectly, with, to, or from, or for, or on account of, or on behalf of, or for the benefit of, any other person, with knowledge or reasonable cause to believe that such other person is an enemy or ally of enemy, or is conducting or taking part in such trade, directly or indirectly, for, or on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy.

(b) For any person, except with the license of the President, to transport or attempt to transport into or from the United States, or for any owner, master, or other person in charge of a vessel of American registry to transport or attempt to transport from any place to any other place, any subject or citizen of an enemy or ally of enemy nation, with knowledge or reasonable cause to believe that the person transported or attempted to be transported is such subject or citizen.

✓ (c) For any person (other than a person in the service of the United States Government or of the Government of any nation, except that of an enemy or ally of enemy nation, and other than such persons or classes of persons as may be exempted hereunder by the President or by such person as he may direct), to send, or take out of, or bring into, or attempt to send, or take out of, or bring into the United States, any letter or other writing or tangible form of communication, except in the regular course of the mail; and it shall be unlawful for any person to send, take, or transmit, or attempt to send, take, or transmit out of the United States, any letter or other writing, book, map, plan, or other paper, picture, or any telegram, cablegram, or wireless message, or other form of communication intended for or to be delivered, directly or indirectly, to an enemy or ally of enemy: Provided, however, That any person may send, take, or transmit out of the United States anything herein forbidden if he shall first submit the same to the President, or to such officer as the President may direct, and shall obtain the license or consent of the President, under such rules and regula-

tions, and with such exemptions, as shall be prescribed by the President.

✓ (d) Whenever, during the present war, the President shall deem that the public safety demands it, he may cause to be censored under such rules and regulations as he may from time to time establish, communications by mail, cable, radio, or other means of transmission passing between the United States and any foreign country he may from time to time specify, or which may be carried by any vessel or other means of transportation touching at any port, place, or territory of the United States and bound to or from any foreign country. Any person who willfully evades or attempts to evade the submission of any such communication to such censorship or willfully uses or attempts to use any code or other device for the purpose of concealing from such censorship the intended meaning of such communication shall be punished as provided in section sixteen of this Act.

✓ Sec. 4. (a) Every enemy or ally of enemy insurance or reinsurance company, and every enemy or ally of enemy, doing business within the United States through an agency or branch office, or otherwise, may, within thirty days after the passage of this Act, apply to the President for a license to continue to do business; and, within thirty days after such application, the President may enter an order either granting or refusing to grant such license. The license, if granted, may be temporary or otherwise, and for such period of time, and may contain such provisions and conditions regulating the business, agencies, managers and trustees and the control and disposition of the funds of the company, or of such enemy or ally of enemy, as the President shall deem necessary for the safety of the United States; and any license granted hereunder may be revoked or regranted or renewed in such manner and at such times as the President shall determine: Provided, however, That reasonable notice of his intent to refuse to grant a license or to revoke a license granted to any reinsurance company shall be given by him to all insurance companies incorporated within the United States and known to the President to be doing business with such reinsurance company: Provided further, That no insurance company, organized within the United States, shall be obligated to continue any existing contract, entered into prior to the beginning of the war, with any enemy or ally of enemy insurance or reinsurance company, but any such company may abrogate and cancel any such contract by serving thirty days' notice in writing upon the President of its election to abrogate such contract.

For a period of thirty days after the passage of this Act, and further pending the entry of such order by the President, after application made by any enemy or ally of enemy insurance or reinsurance company, within such thirty days as above provided, the provisions of the President's proclamation of April sixth, nineteen hundred and seventeen, relative to agencies in the United States of certain insurance companies, as modified by the provisions of the President's proclamation of July thirteenth, nineteen hundred and seventeen, relative to marine and war-risk insurance, shall remain in full force and effect so far as it applies to such German insurance companies, and the conditions of said proclamation of April sixth, nineteen hundred and

seventeen, as modified by said proclamation of July thirteenth, nineteen hundred and seventeen, shall also during said period of thirty days after the passage of this Act, and pending the order of the President as herein provided, apply to any enemy or ally of enemy insurance or reinsurance company, anything in this Act to the contrary notwithstanding. It shall be unlawful for any enemy or ally of enemy insurance or reinsurance company, to whom license is granted, to transmit out of the United States any funds belonging to or held for the benefit of such company or to use any such funds as the basis for the establishment directly or indirectly of any credit within or outside of the United States to, or for the benefit of, or on behalf of, or on account of, an enemy or ally of enemy.

For a period of thirty days after the passage of this Act, and further pending the entry of such order by the President, after application made within such thirty days by any enemy or ally of enemy, other than an insurance or reinsurance company as above provided, it shall be lawful for such enemy or ally of enemy to continue to do business in this country and for any person to trade with, to, from, for, on account of, on behalf of or for the benefit of such enemy or ally of enemy, anything in this Act to the contrary notwithstanding: Provided, however, That the provisions of sections three and sixteen hereof shall apply to any act or attempted act of transmission or transfer of money or other property out of the United States and to the use or attempted use of such money or property as the basis for the establishment of any credit within or outside of the United States to, or for the benefit of, or on behalf of, or on account of, an enemy or ally of enemy.

If no license is applied for within thirty days after the passage of this Act, or if a license shall be refused to any enemy or ally of enemy, whether insurance or reinsurance company or other person, making application, or if any license granted shall be revoked by the President, the provisions of sections three and sixteen hereof shall forthwith apply to all trade or to any attempt to trade with, to, from, for, by, on account of, or on behalf of, or for the benefit of such company or other person: Provided, however, That after such refusal or revocation, anything in this Act to the contrary notwithstanding, it shall be lawful for a policyholder or for an insurance company, not an enemy or ally of enemy, holding insurance or having effected reinsurance in or with such enemy or ally of enemy insurance or reinsurance company, to receive payment of, and for such enemy or ally of enemy insurance or reinsurance company to pay any premium, return premium, claim, money, security, or other property due or which may become due on or in respect to such insurance or reinsurance in force at the date of such refusal or revocation of license; and nothing in this Act shall vitiate or nullify then existing policies or contracts of insurance or reinsurance, or the conditions thereof; and any such policyholder or insurance company, not an enemy or ally of enemy, having any claim to or upon money or other property of the enemy or ally of enemy insurance or reinsurance company in the custody or control of the alien property custodian, hereinafter provided for, or of the Treasurer of the United States, may make application for the payment thereof and may institute suit as provided in section nine hereof.

(b) That, during the present war, no enemy, or ally of enemy, and no partnership of which he is a member or was a member at the beginning of the war, shall for any purpose assume or use any name other than that by which such enemy or partnership was ordinarily known at the beginning of the war, except under license from the President.

Whenever, during the present war, in the opinion of the President the public safety or public interest requires, the President may prohibit any or all foreign insurance companies from doing business in the United States, or the President may license such company or companies to do business upon such terms as he may deem proper.

Sec. 5. (a) That the President, if he shall find it compatible with the safety of the United States and with the successful prosecution of the war, may, by proclamation, suspend the provisions of this Act so far as they apply to an ally of enemy, and he may revoke or renew such suspension from time to time; and the President may grant licenses, special or general, temporary or otherwise, and for such period of time and containing such provisions and conditions as he shall prescribe, to any person or class of persons to do business as provided in subsection (a) of section 4 hereof, and to perform any act made unlawful without such license in section three hereof, and to file and prosecute applications under subsection (b) of section ten hereof; and he may revoke or renew such licenses from time to time, if he shall be of opinion that such grant or revocation or renewal shall be compatible with the safety of the United States and with the successful prosecution of the war; and he may make such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out the provisions of this Act; and the President may exercise any power or authority conferred by this Act through such officer or officers as he shall direct.

If the President shall have reasonable cause to believe that any act is about to be performed in violation of section three hereof he shall have authority to order the postponement of the performance of such act for a period not exceeding ninety days, pending investigation of the facts by him.

(b) That the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, export or earmarkings of gold or silver coin or bullion or currency, transfers of credit in any form (other than credits relating solely to transactions to be executed wholly within the United States), and transfers of evidences of indebtedness or of the ownership of property between the United States and any foreign country, whether enemy, ally of enemy or otherwise, or between residents of one or more foreign countries, by any person within the United States; and he may require any such person engaged in any such transaction to furnish, under oath, complete information relative thereto, including the production of any books of account, contracts, letters or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed.

Sec. 6. That the President is authorized to appoint, prescribe the duties of, and fix the salary (not to exceed \$5,000 per annum) of an official to be known as the alien property custodian, who shall be em-

powered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to said custodian under the provisions of this Act; and to hold, administer, and account for the same under the general direction of the President and as provided in this Act. The alien property custodian shall give such bond or bonds, and in such form and amount, and with such security as the President shall prescribe. The President may further employ in the District of Columbia and elsewhere and fix the compensation of such clerks, attorneys, investigators, accountants, and other employees as he may find necessary for the due administration of the provisions of this Act: Provided, That such clerks, investigators, accountants, and other employees shall be appointed from lists of eligibles to be supplied by the Civil Service Commission and in accordance with the civil-service law: Provided further, That the President shall cause a detailed report to be made to Congress on the first day of January of each year of all proceedings had under this Act during the year preceding. Such report shall contain a list of all persons appointed or employed, with the salary or compensation paid to each, and a statement of the different kinds of property taken into custody and the disposition made thereof.

Sec. 7. (a) That every corporation incorporated within the United States, and every unincorporated association, or company, or trustee, or trustees within the United States, issuing shares or certificates representing beneficial interests, shall, under such rules and regulations as the President may prescribe and, within sixty days after the passage of this Act, and at such other times thereafter as the President may require, transmit to the alien property custodian a full list, duly sworn to, of every officer, director, or stockholder known to be, or whom the representative of such corporation, association, company, or trustee has reasonable cause to believe to be an enemy or ally of enemy resident within the territory, or a subject or citizen residing outside of the United States, of any nation with which the United States is at war, or resident within the territory, or a subject or citizen residing outside of the United States, of any ally of any nation with which the United States is at war, together with the amount of stock or shares owned by each such officer, director, or stockholder, or in which he has any interest.

The President may also require a similar list to be transmitted of all stock or shares owned on February third, nineteen hundred and seventeen, by any person now defined as an enemy or ally of enemy, or in which any such person had any interest; and he may also require a list to be transmitted of all cases in which said corporation, association, company or trustee has reasonable cause to believe that the stock or shares on February third, nineteen hundred and seventeen, were owned or are owned by such enemy or ally of enemy, though standing on the books in the name of another: Provided, however, That the name of any such officer, director, or stockholder shall be stricken permanently or temporarily from such list by the alien property custodian when he shall be satisfied that he is not such enemy or ally of enemy.

Any person in the United States who holds or has or shall hold or have custody or control of any property beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of enemy, or of any person whom he may have reasonable cause to believe to be an enemy or ally of enemy and any person in the United States who is or shall be indebted in any way to an enemy or ally of enemy, or to any person whom he may have reasonable cause to believe to be an enemy or ally of enemy, shall, with such exceptions and under such rules and regulations as the President shall prescribe, and within thirty days after the passage of this Act, or within thirty days after such property shall come within his custody or control, or after such debt shall become due, report the fact to the alien-property custodian by written statement under oath containing such particulars as said custodian shall require. The President may also require a similar report of all property so held, of, for, or on behalf of, and of all debts so owed to, any person now defined as an enemy or ally of enemy, on February third, nineteen hundred and seventeen: Provided, That the name of any person shall be stricken from the said report by the alien-property custodian, either temporarily or permanently, when he shall be satisfied that such person is not an enemy or ally of enemy. The President may extend the time for filing the lists or reports required by this section for an additional period not exceeding ninety days.

(b) Nothing in this Act contained shall render valid or legal, or be construed to recognize as valid or legal, any act or transaction constituting trade with, to, from, for or on account of, or on behalf or for the benefit of an enemy performed or engaged in since the beginning of the war and prior to the passage of this Act, or any such act or transaction hereafter performed or engaged in except as authorized hereunder, which would otherwise have been or be void, illegal, or invalid at law. No conveyance, transfer, delivery, payment, or loan of money or other property, in violation of section three hereof, made after the passage of this Act, and not under license as herein provided shall confer or create any right or remedy in respect thereof; and no person shall by virtue of any assignment, indorsement, or delivery to him of any debt, bill, note, or other obligation or chose in action by, from, or on behalf of, or on account of, or for the benefit of an enemy or ally of enemy have any right or remedy against the debtor, obligor, or other person liable to pay, fulfill, or perform the same unless said assignment, indorsement, or delivery was made prior to the beginning of the war or shall be made under license as herein provided, or unless, if made after the beginning of the war and prior to the date of passage of this Act, the person to whom the same was made shall prove lack of knowledge and of reasonable cause to believe on his part that the same was made by, from or on behalf of, or on account of, or for the benefit of an enemy or ally of enemy; and any person who knowingly pays, discharges, or satisfies any such debt, note, bill, or other obligation or chose in action shall, on conviction thereof, be deemed to violate section three hereof: Provided, That nothing in this Act contained shall prevent the carrying out, completion, or performance of any contract, agreement, or obligation originally made with or entered into by an enemy or ally of enemy where, prior to the beginning of the

war and not in contemplation thereof, the interest of such enemy or ally of enemy devolved by assignment or otherwise upon a person not an enemy or ally of enemy, and no enemy or ally of enemy will be benefited by such carrying out, completion, or performance otherwise than by release from obligation thereunder.

Nothing in this Act shall be deemed to prevent payment of money belonging or owing to an enemy or ally of enemy to a person within the United States not an enemy or ally of enemy, for the benefit of such person or of any other person within the United States not an enemy or ally of enemy, if the funds so paid shall have been received prior to the beginning of the war and such payments arise out of transactions entered into prior to the beginning of the war, and not in contemplation thereof: Provided, That such payment shall not be made without the license of the President, general or special, as provided in this Act.

Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof: Provided, however, That an enemy or ally of enemy licensed to do business under this Act may prosecute and maintain any such suit or action so far as the same arises solely out of the business transacted within the United States under such license and so long as such license remains in full force and effect: And provided further, That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him.

Receipt of notice from the President to the effect that he has reasonable ground to believe that any person is an enemy or ally of enemy shall be prima facie defense to any one receiving the same, in any suit or action at law or in equity brought or maintained, or to any right or set-off or recoupment asserted by, such person and based on failure to complete or perform since the beginning of the war any contract or other obligation. In any prosecution under section sixteen hereof, proof of receipt of notice from the President to the effect that he has reasonable cause to believe that any person is an enemy or ally of enemy shall be prima facie evidence that the person receiving such notice has reasonable cause to believe such other person to be an enemy or ally of enemy within the meaning of section three hereof.

(c) If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian.

(d) If not required to pay, convey, transfer, assign, or deliver under the provisions of subsection (c) hereof, any person not an enemy or ally of enemy who owes to, or holds for, or on account of, or on behalf of, or for the benefit of an enemy or of an ally of enemy not holding a license granted by the President hereunder, any money or other property, or to whom any obligation or form of liability to such

enemy or ally of enemy is presented for payment, may, at his option, with the consent of the President, pay, convey, transfer, assign, or deliver to the alien property custodian said money or other property under such rules and regulations as the President shall prescribe.

(e) No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.

Any payment, conveyance, transfer, assignment, or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. The alien property custodian and such other persons as the President may appoint shall have power to execute, acknowledge, and deliver any such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise such acquittance and discharge, and shall, in case of payment to the alien property custodian of any debt or obligation owed to an enemy or ally of enemy, deliver up any notes, bonds, or other evidences of indebtedness or obligation, or any security therefor in which such enemy or ally of enemy had any right or interest that may have come into the possession of the alien property custodian; with like effect as if he or they, respectively, were duly appointed by the enemy or ally of enemy, creditor, or obligee. The President shall issue to every person so appointed a certificate of the appointment and authority of such person, and such certificate shall be received in evidence in all courts within the United States. Whenever any such certificate of authority shall be offered to any registrar, clerk, or other recording officer, Federal or otherwise, within the United States, such officer shall record the same in like manner as a power of attorney, and such record or a duly certified copy thereof shall be received in evidence in all courts of the United States or other courts within the United States.

Sec. 8. (a) That any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand, and any person not an enemy or ally of enemy who is a party to any lawful contract with an enemy or ally of enemy, the terms of which provide for a termination thereof upon notice or for acceleration of maturity on presentation or demand, may continue to hold said property, and, after default, may dispose of the property in accordance with law or may terminate or mature such contract by notice or presentation or demand served or made on the alien property custodian in accordance with the law and the terms of such instrument or contract and under such rules and regulations as the President shall prescribe; and such notice and such presentation and demand shall have, in all respects, the same force and effect as if duly served or made upon the enemy or ally of enemy personally: Provided, That no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which, by law or by the terms of said instrument or contract, no notice, presentation, or demand was, prior to the pass-

age of this Act, required; and that in case where, by law or by the terms of such instrument or contract, notice is required, no longer period of notice shall be required: Provided further, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order.

(b) That any contract entered into prior to the beginning of the war between any citizen of the United States or any corporation organized within the United States, and an enemy or ally of an enemy, the terms of which provide for the delivery, during or after any war in which a present enemy or ally of enemy nation has been or is now engaged, of anything produced, mined, or manufactured in the United States, may be abrogated by such citizen or corporation by serving thirty days' notice in writing upon the alien property custodian of his or its election to abrogate such contract.

(c) The running of any statute of limitations shall be suspended with reference to the rights or remedies on any contract or obligation entered into prior to the beginning of the war between parties neither of whom is an enemy or ally of enemy, and containing any promise to pay or liability for payment which is evidenced by drafts or other commercial paper drawn against or secured by funds or other property situated in an enemy or ally of enemy country, and no suit shall be maintained on any such contract or obligation in any court within the United States until after the end of the war, or until the said funds or property shall be released for the payment or satisfaction of such contract or obligation: Provided, however, That nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all other cases where such suspension would occur under existing law.

Sec. 9. That any person, not an enemy, or ally of enemy, claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy, or ally of enemy, whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may, with the assent of the owner of said property and of all persons claiming any right, title, or interest therein, order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the alien property custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled: Provided, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title or

interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application, or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war, institute a suit in equity in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the alien property custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the alien property custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the alien property custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated.

Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the alien property custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

This section shall not apply, however, to money paid to the alien property custodian under section ten hereof.

Sec. 10. That nothing contained in this Act shall be held to make unlawful any of the following Acts:

(a) An enemy, or ally of enemy, may file and prosecute in the United States an application for letters patent, or for registration of trade-mark, print, label, or copyright, and may pay any fees therefor in accordance with and as required by the provisions of existing law and fees for attorneys or agents for filing and prosecuting such applications. Any such enemy, or ally of enemy, who is unable during war, or within six months thereafter, on account of conditions arising out of war, to file any such application, or to pay any official fee, or to take any action required by law within the period prescribed by law, may be granted an extension of nine months beyond the expiration of said period, provided the nation of which the said applicant is a citizen, subject, or corporation shall extend substantially similar privileges to citizens and corporations of the United States.

(b) Any citizen of the United States, or any corporation organized within the United States, may, when duly authorized by the President, pay to an enemy or ally of enemy any tax, annuity, or fee which may be required by the laws of such enemy or ally of enemy nation in relation to patents and trade-marks, prints, labels, and copyrights; and any such citizen or corporation may file and prosecute an application for letters patent or for registration of trade-mark, print, label, or copyright in the country of an enemy, or of an ally of enemy after first submitting such application to the President and receiving license so

to file and prosecute, and to pay the fees required by law and customary agents' fees, the maximum amount of which in each case shall be subject to the control of the President.

(c) Any citizen of the United States or any corporation organized within the United States desiring to manufacture, or cause to be manufactured, a machine, manufacture, composition of matter, or design, or to carry on, or to use any trade-mark, print, label or cause to be carried on, a process under any patent or copyrighted matter owned or controlled by an enemy or ally of enemy at any time during the existence of a state of war may apply to the President for a license; and the President is hereby authorized to grant such a license, nonexclusive or exclusive as he shall deem best, provided he shall be of the opinion that such grant is for the public welfare, and that the applicant is able and intends in good faith to manufacture, or cause to be manufactured, the machine, manufacture, composition of matter, or design, or to carry on, or cause to be carried on, the process or to use the trade-mark, print, label or copyrighted matter. The President may prescribe the conditions of this license, including the fixing of prices of articles and products necessary to the health of the military and naval forces of the United States or the successful prosecution of the war, and the rules and regulations under which such license may be granted and the fee which shall be charged therefor, not exceeding \$100, and not exceeding one per centum of the fund deposited as hereinafter provided. Such license shall be a complete defense to any suit at law or in equity instituted by the enemy or ally of enemy owners of the letters patent, trade-mark, print, label or copyright, or otherwise, against the licensee for infringement or for damages, royalty, or other money award on account of anything done by the licensee under such license, except as provided in subsection (f) hereof.

(d) The licensee shall file with the President a full statement of the extent of the use and enjoyment of the license, and of the prices received in such form and at such stated periods (at least annually) as the President may prescribe; and the licensee shall pay at such times as may be required to the alien property custodian not to exceed five per centum of the gross sums received by the licensee from the sale of said inventions or use of the trade-mark, print, label or copyrighted matter, or, if the President shall so order, five per centum of the value of the use of such inventions, trade-marks, prints, labels or copyrighted matter to the licensee as established by the President; and sums so paid shall be deposited by said alien property custodian forthwith in the Treasury of the United States as a trust fund for the said licensee and for the owner of the said patent, trade-mark, print, label or copyright registration as hereinafter provided, to be paid from the Treasury upon order of the court, as provided in subdivision (f) of this section, or upon the direction of the alien property custodian.

(e) Unless surrendered or terminated as provided in this Act, any license granted hereunder shall continue during the term fixed in the license or in the absence of any such limitation during the term of the patent, trade-mark, print, label, or copyright registration under which it is granted. Upon violation by the licensee of any of the pro-

visions of this Act, or of the conditions of the license, the President may, after due notice and hearing, cancel any license granted by him.

(f) The owner of any patent, trade-mark, print, label, or copyright under which a license is granted hereunder may, after the end of the war and until the expiration of one year thereafter, file a bill in equity against the licensee in the district court of the United States for the district in which the said licensee resides, or, if a corporation, in which it has its principal place of business (to which suit the Treasurer of the United States shall be made a party), for recovery from the said licensee for all use and enjoyment of the said patented invention, trade-mark, print, label, or copyrighted matter: Provided, however, That whenever suit is brought, as above, notice shall be filed with the alien property custodian within thirty days after date of entry of suit: Provided further, That the licensee may make any and all defenses which would be available were no license granted. The court on due proceedings had may adjudge and decree to the said owner payment of a reasonable royalty. The amount of said judgment and decree, when final, shall be paid on order of the court to the owner of the patent from the fund deposited by the licensee, so far as such deposit will satisfy said judgment and decree; and the said payment shall be in full or partial satisfaction of said judgment and decree, as the facts may appear; and if, after payment of all such judgments and decrees, there shall remain any balance of said deposit, such balance shall be repaid to the licensee on order of the alien property custodian. If no suit is brought within one year after the end of the war, or no notice is filed as above required, then the licensee shall not be liable to make any further deposits, and all funds deposited by him shall be repaid to him on order of the alien property custodian. Upon entry of suit and notice filed as above required, or upon repayment of funds as above provided, the liability of the licensee to make further reports to the President shall cease.

If suit is brought as above provided, the court may, at any time, terminate the license, and may, in such event, issue an injunction to restrain the licensee from infringement thereafter, or the court, in case the licensee, prior to suit, shall have made investment of capital based on possession of the license, may continue the license for such period and upon such terms and with such royalties as it shall find to be just and reasonable.

(g) Any enemy, or ally of enemy, may institute and prosecute suits in equity against any person other than a licensee under this Act to enjoin infringement of letters patent, trade-mark, print, label, and copyrights in the United States owned or controlled by said enemy or ally of enemy, in the same manner and to the extent that he would be entitled so to do if the United States was not at war: Provided, That no final judgment or decree shall be entered in favor of such enemy or ally of enemy by any court except after thirty days' notice to the alien property custodian. Such notice shall be in writing and shall be served in the same manner as civil process of Federal courts.

(h) All powers of attorney heretofore or hereafter granted by an enemy or ally of enemy to any person within the United States, in so

far as they may be requisite to the performance of acts authorized in subsections (a) and (g) of this section, shall be valid.

(i) Whenever the publication of an invention by the granting of a patent may, in the opinion of the President, be detrimental to the public safety or defense, or may assist the enemy or endanger the successful prosecution of the war, he may order that the invention be kept secret and withhold the grant of a patent until the end of the war: Provided, That the invention disclosed in the application for said patent may be held abandoned upon it being established before or by the Commissioner of Patents that, in violation of said order, said invention has been published or that an application for a patent therefor has been filed in any other country, by the inventor or his assigns or legal representatives, without the consent or approval of the commissioner or under a license of the President.

When an applicant whose patent is withheld as herein provided and who faithfully obeys the order of the President above referred to shall tender his invention to the Government of the United States for its use, he shall, if he ultimately receives a patent, have the right to sue for compensation in the Court of Claims, such right to compensation to begin from the date of the use of the invention by the Government.

Sec. 11. Whenever during the present war the President shall find that the public safety so requires and shall make proclamation thereof it shall be unlawful to import into the United States from any country named in such proclamation any article or articles mentioned in such proclamation except at such time or times, and under such regulations or orders, and subject to such limitations and exceptions as the President shall prescribe, until otherwise ordered by the President or by Congress: Provided, however, That no preference shall be given to the ports of one State over those of another.

Sec. 12. That all moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the war as the President shall deem practicable, such securities shall be sold and the proceeds deposited in the Treasury.

All other property of an enemy, or ally of enemy, conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder shall be safely held and administered by him except as hereinafter provided; and the President is authorized to designate as a depository, or depositaries, of property of an enemy or ally of enemy, any bank, or banks, or trust company, or trust companies, or other suitable depository or depositaries, located and doing business in the United States. The alien property custodian may deposit with such designated depository or depositaries, or with the Secretary of the Treasury, any stocks, bonds, notes, time drafts, time bills of exchange, or other securities, or property (except money or checks or drafts payable on demand which are required to be deposited with the

Secretary of the Treasury) and such depositary or depositaries shall be authorized and empowered to collect any dividends or interest or income that may become due and any maturing obligations held for the account of such custodian. Any moneys collected on said account shall be paid and deposited forthwith by said depositary or by the alien property custodian into the Treasury of the United States as hereinbefore provided.

The President shall require all such designated depositaries to execute and file bonds sufficient in his judgment to protect property on deposit, such bonds to be conditioned as he may direct.

The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which shall come into his possession in pursuance of the provisions of this Act, and, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, may manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights which may be or become appurtenant thereto or to the ownership thereof, if and when necessary to prevent waste and protect such property and to the end that interests of the United States in such property and rights or of such person as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him.

Any money or property required or authorized by the provisions of this Act to be paid, conveyed, transferred, assigned, or delivered to the alien property custodian shall, if said custodian shall so direct by written order, be paid, conveyed, transferred, assigned, or delivered to the Treasurer of the United States with the same effect as if to the alien property custodian.

After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct: Provided, however, That on order of the President as set forth in section nine hereof, or of the court, as set forth in sections nine and ten hereof, the alien property custodian or the Treasurer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the person to whom the President shall so order, or in whose behalf the court shall enter final judgment or decree, any property of an enemy or ally of enemy held by said custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or

decree of the court: And provided further, That the Treasurer of the United States, on order of the alien property custodian shall, as provided in section ten hereof, repay to the licensee any funds deposited by said licensee.

Sec. 13. That, during the present war, in addition to the facts required by sections forty-one hundred and ninety-seven, forty-one hundred and ninety-eight, and forty-two hundred of the Revised Statutes, as amended by the Act of June fifteenth, nineteen hundred and seventeen, to be set out in the master's and shipper's manifests before clearance will be issued to vessels bound to foreign ports, the master or person in charge of any vessel, before departure of such vessel from port, shall deliver to the collector of customs of the district wherein such vessel is located a statement duly verified by oath that the cargo is not shipped or to be delivered in violation of this Act, and the owners, shippers, or consignors of the cargo of such vessels shall in like manner deliver to the collector like statement under oath as to the cargo or the parts thereof laden or shipped by them, respectively, which statement shall contain also the names and addresses of the actual consignees of the cargo, or if the shipment is made to a bank or other broker, factor, or agent, the names and addresses of the persons who are the actual consignees on whose account the shipment is made. The master or person in control of the vessel shall, on reaching port of destination of any of the cargo, deliver a copy of the manifest and of the said master's, owner's, shipper's, or consignor's statement to the American consular officer of the district in which the cargo is unladen.

Sec. 14. That, during the present war, whenever there is reasonable cause to believe that the manifest or the additional statements under oath required by the preceding section are false or that any vessel, domestic or foreign, is about to carry out of the United States any property to or for the account or benefit of an enemy, or ally of enemy, or any property or person whose export, taking out, or transport will be in violation of law, the collector of customs for the district in which such vessel is located is hereby authorized and empowered subject to review by the President to refuse clearance to any such vessel, domestic or foreign, for which clearance is required by law, and by formal notice served upon the owners, master, or person or persons in command or charge of any domestic vessel for which clearance is not required by law, to forbid the departure of such vessel from the port, and it shall thereupon be unlawful for such vessel to depart.

The collector of customs shall, during the present war, in each case report to the President the amount of gold or silver coin or bullion or other moneys of the United States contained in any cargo intended for export. Such reports shall include the names and addresses of the consignors and consignees, together with any facts known to the collector with reference to such shipment and particularly those which may indicate that such gold or silver coin or bullion or moneys of the United States may be intended for delivery or may be delivered, directly or indirectly, to an enemy or an ally of enemy.

Sec. 15. That the sum of \$450,000 is hereby appropriated, out of any money in the Treasury of the United States not otherwise appro-

riated, to be used in the discretion of the President for the purpose of carrying out the provisions of this Act during the fiscal year ending June thirtieth, nineteen hundred and eighteen, and for the payment of salaries of all persons employed under this Act, together with the necessary expenses for transportation, subsistence, rental of quarters in the District of Columbia, books of reference, periodicals, stationery, typewriters and exchanges thereof, miscellaneous supplies, printing to be done at the Government Printing Office, and all other necessary expenses not included in the foregoing.

✓ Sec. 16. That whoever shall willfully violate any of the provisions of this Act or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act shall, upon conviction, be fined not more than \$10,000, or, if a natural person, imprisoned for not more than ten years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by a like fine, imprisonment, or both, and any property, funds, securities, papers, or other articles or documents, or any vessel, together with her tackle, apparel, furniture, and equipment, concerned in such violation shall be forfeited to the United States.

✓ Sec. 17. That the district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary."

✓ Sec. 18. That the several courts of first instance in the Philippine Islands and the district court of the Canal Zone shall have jurisdiction of offenses under this Act committed within their respective districts, and concurrent jurisdiction with the district courts of the United States of offenses under this Act committed upon the high seas and of conspiracies to commit such offenses as defined by section thirty-seven of the Act entitled "An Act to codify, revise, and amend the penal laws of the United States," approved March fourth, nineteen hundred and nine, and the provisions of such section for the purpose of this Act are hereby extended to the Philippine Islands and to the Canal Zone.

Sec. 19. That ten days after the approval of this Act and until the end of the war, it shall be unlawful for any person, firm, corporation, or association, to print, publish, or circulate, or cause to be printed, published, or circulated in any foreign language, any news item, editorial or other printed matter, respecting the Government of the United States, or of any nation engaged in the present war, its policies, international relations, the state or conduct of the war, or any matter relating thereto: Provided, That this section shall not apply to any print, newspaper, or publication where the publisher or distributor thereof, on or before offering the same for mailing, or in any manner distributing it to the public, has filed with the postmaster at the place of pub-

lication, in the form of an affidavit, a true and complete translation of the entire article containing such matter proposed to be published in such print, newspaper, or publication, and has caused to be printed, in plain type in the English language, at the head of each such item, editorial, or other matter, on each copy of such print, newspaper, or publication, the words "True translation filed with the postmaster at on (naming the post office where the translation was filed, and the date of filing thereof), as required by the Act of (here giving the date of this Act)."

Any print, newspaper, or publication in any foreign language which does not conform to the provisions of this section is hereby declared to be nonmailable, and it shall be unlawful for any person, firm, corporation, or association, to transport, carry, or otherwise publish or distribute the same, or to transport, carry or otherwise publish or distribute any matter which is made nonmailable by the provisions of the Act relating to espionage, approved June fifteenth, nineteen hundred and seventeen: Provided further, That upon evidence satisfactory to him that any print, newspaper, or publication, printed in a foreign language may be printed, published, and distributed free from the foregoing restrictions and conditions without detriment to the United States in the conduct of the present war, the President may cause to be issued to the printers or publishers of such print, newspaper, or publication, a permit to print, publish, and circulate the issue or issues of their print, newspaper, or publication, free from such restrictions and requirements, such permits to be subject to revocation at his discretion. And the Postmaster General shall cause copies of all such permits and revocations of permits to be furnished to the postmaster of the post office serving the place from which the print, newspaper, or publication, granted the permit is to emanate. All matter printed, published and distributed under permits shall bear at the head thereof in plain type in the English language, the words, "Published and distributed under permit authorized by the Act of (here giving date of this Act), on file at the post office of (giving name of office)."

Any person who shall make an affidavit containing any false statement in connection with the translation provided for in this section shall be guilty of the crime of perjury and subject to the punishment provided therefor by section one hundred and twenty-five of the Act of March fourth, nineteen hundred and nine, entitled "An Act to codify, revise, and amend the penal laws of the United States," and any person, firm, corporation, or association, violating any other requirement of this section shall, on conviction thereof, be punished by a fine of not more than \$500, or by imprisonment of not more than one year, or, in the discretion of the court, may be both fined and imprisoned.

Approved, October 6, 1917.

[Public—No. 109—65th Congress. H. R. 9867.]

An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and prior fiscal years, on account of war expenses, and for other purposes. [March 28, 1918.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, to supply urgent deficiencies in appropriations for the fiscal year ending June thirtieth, nineteen hundred and eighteen, and prior fiscal years, on account of war expenses, and for other purposes, namely:

For expenses of the Alien Property Custodian authorized by the Act entitled "An Act to define, regulate, and punish trading with the enemy, and for other purposes," approved October sixth, nineteen hundred and seventeen, including personal and other services and rental of quarters in the District of Columbia and elsewhere, per diem allowances in lieu of subsistence not exceeding \$4, traveling expenses, printing and binding, and necessary supplies and equipment, \$225,000.

The President is authorized to acquire the title to the docks, piers, warehouses, wharves, and terminal equipment and facilities on the Hudson River now owned by the North German Lloyd Dock Company and the Hamburg-American Line Terminal and Navigation Company, two corporations of the State of New Jersey, if he shall deem it necessary for the national security and defense: Provided, That if such property can not be procured by purchase, then the President is authorized and empowered to take over for the United States the immediate possession and title thereof. If any such property shall be taken over as aforesaid, the United States shall make just compensation therefor to be determined by the President. Upon the taking over of said property by the President, as aforesaid, the title to all such property so taken over shall immediately vest in the United States: Provided further, That section three hundred and fifty-five of the Revised Statutes of the United States shall not apply to any expenditures herein or hereafter authorized in connection with the property acquired.

The fourth paragraph of section twelve of the "Trading with the enemy Act," approved October sixth, nineteen hundred and seventeen, is amended to read as follows:

"The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner

as though he were the absolute owner thereof: Provided, That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: Provided further, That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such property at public sale or otherwise as the President may direct. Any person purchasing property from the alien property custodian for an undisclosed principal, or for re-sale to a person not a citizen of the United States, or for the benefit of a person not a citizen of the United States, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than \$10,000, or imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him."

Approved, March 28, 1918.

15. SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

[Public—No. 103—65th Congress. H. R. 6361.]

An Act to extend protection to the civil rights of members of the Military and Naval Establishments of the United States engaged in the present war. [March 8, 1918.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

ARTICLE I.

GENERAL PROVISIONS.

✓ Sec. 100. That for the purpose of enabling the United States the more successfully to prosecute and carry on the war in which it is at present engaged, protection is hereby extended to persons in military service of the United States in order to prevent prejudice or injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the continuance of the present war.

Sec. 101. ✓ (1) That the term "persons in military service," as used in this Act, shall include the following persons and no others: All officers and enlisted men of the Regular Army, the Regular Army Reserve, the Officers' Reserve Corps, and the Enlisted Reserve Corps; all officers and enlisted men of the National Guard and National Guard Reserve recognized by the Militia Bureau of the War Department; all forces raised under the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen; all officers and enlisted men of the Navy, the Marine Corps, and the Coast Guard; all officers and enlisted men of the Naval Militia, Naval Reserve force, Marine Corps Reserve, and National Naval Volunteers recognized by the Navy Department; all officers of the Public Health Service detailed by the Secretary of the Treasury for duty either with the Army or the Navy; any of the personnel of the Lighthouse Service and of the Coast and Geodetic Survey transferred by the President to the service and jurisdiction of the War Department or of the Navy Department; members of the Nurse Corps; Army field clerks; field clerks, Quartermaster Corps; civilian clerks and employees on duty with the military forces detailed for service abroad in accordance with provisions of existing law; and members of any other body who have heretofore or may hereafter become a part of the military or naval forces of the United States. The term "military service," as used in this definition, shall signify active service in any branch of service heretofore mentioned or referred to, but reserves and persons on the retired list shall not be included in the term "persons in military service" until ordered to active service. The term "active service" shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause.

✓ (2) The term "period of military service," as used in this Act, shall include the time between the following dates: For persons in active service at the date of the approval of this Act it shall begin with the date of approval of this Act; for persons entering active service after the date of this Act, with the date of entering active service. It shall terminate with the date of discharge from active service or death while in active service, but in no case later than the date when this Act ceases to be in force.

(3) The term "person," as used in this Act, with reference to the holder of any right alleged to exist against a person in military service or against a person secondarily liable under such right, shall include individuals, partnerships, corporations, and any other forms of business association.

(4) The term "court" as used in this Act shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record.

✓ (5) The term "termination of the war" as used in this Act shall mean the termination of the present war by the treaty of peace as proclaimed by the President.

Sec. 102. (1) That the provisions of this Act shall apply to the United States, the several States and Territories, the District of Columbia, and all territory subject to the jurisdiction of the United States,

and to proceedings commenced in any court therein, and shall be enforced through the usual forms of procedure obtaining in such courts or under such regulations as may be by them prescribed.

(2) When under this Act any application is required to be made to a court in which no proceeding has already been commenced with respect to the matter, such application may be made to any court.

Sec. 103. Whenever pursuant to any of the provisions of this Act the enforcement of any obligation or liability, the prosecution of any suit or proceeding, the entry or enforcement of any order, writ, judgment, or decree, or the performance of any other act, may be stayed, postponed, or suspended, such stay, postponement, or suspension may, in the discretion of the court, likewise be granted to sureties, guarantors, indorsers, and others subject to the obligation or liability, the performance or enforcement of which is stayed, postponed, or suspended.

When a judgment or decree is vacated or set aside in whole or in part, as provided in this Act, the same may, in the discretion of the court, likewise be set aside and vacated as to any surety, guarantor, indorser, or other person liable upon the contract or liability for the enforcement of which the judgment or decree was entered.

ARTICLE II.

GENERAL RELIEF.

Sec. 200. That in any action or proceeding commenced in any court if there shall be a default of an appearance by the defendant the plaintiff before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest and the court shall on application make such appointment. Unless it appears that the defendant is not in such service the court may require as a condition before judgment is entered that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this Act.

(2) Any person who shall make or use an affidavit required under this section knowing it to be false shall be guilty of a misdemeanor and shall be punishable by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both.

(3) In any action or proceeding in which a person in military service is a party if such party does not personally appear therein or is not represented by an authorized attorney, the court may appoint an attorney to represent him; and in such case a like bond may be required and

an order made to protect the rights of such person. But no attorney appointed under this Act to protect a person in military service shall have power to waive any right of the person for whom he is appointed or bind him by his acts.

(4) If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment.

Sec. 201. That at any stage thereof any action or proceeding commenced in any court by or against a person in military service during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

Sec. 202. That when an action for compliance with the terms of any contract is stayed pursuant to this Act no fine or penalty shall accrue by reason of failure to comply with the terms of such contract during the period of such stay, and in any case where a person fails to perform any obligation and a fine or penalty for such nonperformance is incurred a court may, on such terms as may be just, relieve against the enforcement of such fine or penalty if it shall appear that the person who would suffer by such fine or penalty was in the military service when the penalty was incurred and that by reason of such service the ability of such person to pay or perform was thereby materially impaired.

Sec. 203. That in any action or proceeding commenced in any court against a person in military service, before or during the period of such service, or within sixty days thereafter, the court may, in its discretion, on its own motion, or on application to it by such person or some person on his behalf shall, unless in the opinion of the court the ability of the defendant to comply with the judgment or order entered or sought is not materially affected by reason of his military service:

(1) Stay the execution of any judgment or order entered against such person, as provided in this Act, and

(2) Vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment, as provided in this Act.

Sec. 204. That any stay of any action, proceeding, attachment, or execution, ordered by any court under the provisions of this Act may,

except as otherwise provided, be ordered for the period of military service and three months thereafter or any part of such period, and subject to such terms as may be just, whether as to payment in installments of such amounts and at such times as the court may fix or otherwise. Where the person in military service is a codefendant with others the plaintiff may nevertheless by leave of court proceed against the others.

Sec. 205. That the period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service.

ARTICLE III.

KENT, INSTALLMENT CONTRACTS, MORTGAGES.

Sec. 300. (1) That no eviction or distress shall be made during the period of military service in respect of any premises for which the agreed rent does not exceed \$50 per month, occupied chiefly for dwelling purposes by the wife, children, or other dependents of a person in military service, except upon leave of court granted upon application therefor or granted in an action or proceeding affecting the right of possession.

(2) On any such application or in any such action the court may, in its discretion, on its own motion, and shall, on application, unless in the opinion of the court the ability of the tenant to pay the agreed rent is not materially affected by reason of such military service, stay the proceedings for not longer than three months, as provided in this Act, or it may make such other order as may be just.

(3) Any person who shall knowingly take part in any eviction or distress otherwise than as provided in subsection (1) hereof shall be guilty of a misdemeanor, and shall be punishable by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both.

(4) The Secretary of War or the Secretary of the Navy, as the case may be, is hereby empowered, subject to such regulations as he may prescribe, to order an allotment of the pay of a person in military service in reasonable proportion to discharge the rent of premises occupied for dwelling purposes by the wife, children, or other dependents of such person.

Sec. 301. (1) That no person who has received, or whose assignor has received, under a contract for the purchase of real or personal property, or of lease or bailment with a view to purchase of such property, a deposit or installment of the purchase price from a person or from the assignor of a person who, after the date of payment of such deposit or installment, has entered military service, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for nonpayment of any installment falling due during the period of such military service, except by action in a court of competent jurisdiction.

(1a) Any person who shall knowingly resume possession of property which is the subject of this section otherwise than as provided in

subsection (1) hereof shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both.

(2) Upon the hearing of such action the court may order the repayment of prior installments or deposits or any part thereof, as a condition of terminating the contract and resuming possession of the property, or may, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, order a stay of proceedings as provided in this Act unless, in the opinion of the court, the ability of the defendant to comply with the terms of the contract is not materially affected by reason of such service; or it may make such other disposition of the case as may be equitable to conserve the interests of all parties.

Sec. 302. (1) That the provisions of this section shall apply only to obligations originating prior to the date of approval of this Act and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him.

(2) In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of nonpayment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service, the court may, after hearing, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service—

(a) Stay the proceedings as provided in this Act; or

(b) Make such other disposition of the case as may be equitable to conserve the interests of all parties.

(3) No sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in any such obligation shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court.

J ARTICLE IV.

INSURANCE.

Sec. 400. That in this Article the term "policy" shall include any contract of life insurance on the level premium or legal reserve plan. It shall also include any benefit in the nature of life insurance arising out of membership in any fraternal or beneficial association; the term "premium" shall include membership dues or assessments in such association, and the date of issuance of policy as herein limited shall refer to the date of admission to membership in such association; the term "insured" shall include any person who is the holder of a policy as defined in this Article; the term "insurer" shall include any corporation, partnership, or other form of association which secures or provides insurance under any policy as defined in this Article.

Sec. 401. That the benefits of this Article shall apply to any person in military service who is the holder of a policy of life insurance, when such holder shall apply for such benefits on a form prepared in accordance with regulations which shall be prescribed by the Secretary of the Treasury. Such form shall set forth particularly that the application therein made is a consent to such modification of the terms of the original contract of insurance as are made necessary by the provisions of this Article and by receiving and filing the same the insurer shall be deemed to have assented thereto, to the extent, if any, to which the policy on which the application is made is within the provisions of this Article. The original of such application shall be sent by the insured to the insurer, and a copy thereof to the Bureau of War Risk Insurance.

The Bureau of War Risk Insurance shall issue through suitable military and naval channels a notice explaining the provisions of this Article and shall furnish forms to be distributed to those desiring to make application for its benefits.

Sec. 402. That the benefits of this Act shall be available to any person in military service in respect of contracts of insurance in force under their terms up to but not exceeding a face value of \$5,000, irrespective of the number of policies held by such person whether in one or more companies, when such contracts were made and a premium was paid thereon before September first, nineteen hundred and seventeen; but in no event shall the provisions of this Article apply to any policy on which premiums are due and unpaid for a period of more than one year at the time when application for the benefits of this Article is made or in respect of any policy on which there is outstanding a policy loan or other indebtedness equal to or greater than fifty per centum of the cash surrender value of the policy.

Sec. 403. That the Bureau of War Risk Insurance shall, subject to regulations, which shall be prescribed by the Secretary of the Treasury, compile and maintain a list of such persons in military service as have made application for the benefits of this Article, and shall (1) reject any applications for such benefits made by persons who are not persons in military service; (2) reject any applications for such benefits in excess of the amount permitted by section four hundred and two; and (3) reject any applications in respect of contracts of insurance otherwise not entitled to the benefits of this Article. Said bureau shall immediately notify the insurer and the insured in writing of every rejection or approval.

Sec. 404. That when one or more applications are made under this Article by any one person in military service in respect of insurance exceeding a total face value of \$5,000, whether on one or more policies or in one or more companies, and the insured shall not in his application indicate an order of preference, the Bureau of War Risk Insurance shall reject such policies as have the inferior cash surrender value, so as to reduce the total benefits conferred within the face value of \$5,000, and where necessary for this purpose shall direct the insurer to divide any policy into two separate policies. The said bureau shall immediately notify the insurer and the insured in writing of such selection.

Sec. 405. That no policy which has not lapsed for the nonpayment

of premium before the commencement of the period of military service of the insured, and which has been brought within the benefits of this Article, shall lapse or be forfeited for the nonpayment of premium during the period of such service or during one year after the expiration of such period: Provided, That in no case shall this prohibition extend for more than one year after the termination of the war.

Sec. 406. That within the first fifteen days of each calendar month after the date of approval of this Act until the expiration of one year after the termination of the war, every insurance corporation or association to which application has been made as herein provided, for the benefits of this Article, shall render to the Bureau of War Risk Insurance a report, duly verified, setting forth the following facts:

First. The names of the persons who have applied for such benefits, and the face value of the policies in respect of which such benefits have been applied for by such persons, during the preceding calendar month;

Second. A list as far as practicable of the premiums in respect of policies entitled to the benefits of this Article which remain unpaid on the last day of the preceding calendar month, which day is at least thirty-one days after the due date of the premiums, provided such premiums have not previously been so reported as in default;

Third. A list of premiums which, having been previously reported as in default, have been paid by the policyholder or some one on his behalf in whole or in part during the preceding calendar month;

Fourth. A computation of the difference between the total amount of defaulted premiums therein reported and the total amount of premiums paid as therein reported, after having been previously reported as in default. From this sum shall be deducted the total sum of any premiums previously reported as in default, upon policies in respect of which the Bureau of War Risk Insurance has, since the date of such report, rejected an application for the benefits of this Article. The final sum so arrived at shall be denominated the monthly difference.

Sec. 407. That the Bureau of War Risk Insurance shall verify the computation of monthly difference reported by each insurer, and shall certify it, as corrected, to the Secretary of the Treasury and the insurer.

Sec. 408. That the Secretary of the Treasury shall, within ten days thereafter, deliver each month to the proper officer of each insurer, bonds of the United States to the amount of that multiple of \$100 nearest to the monthly difference certified in respect of each insurer. Such bonds shall be registered in the names of the respective insurers, who shall be entitled to receive the interest accruing thereon, and such bonds shall not be transferred, or again registered, except upon the approval of the Director of the Bureau of War Risk Insurance, and shall remain in the possession of the insurer until settlement is made in accordance with this Article: Provided, That whenever the fact of insolvency shall be ascertained by the Director of the Bureau of War Risk Insurance all obligation on the part of the United States, under this Article, for future premiums on policies of such insurer shall thereupon terminate. An insurer shall furnish semiannual statements to the Bureau of War Risk Insurance.

Sec. 409. That the bonds so delivered shall be held by the respective insurers as security for the payment of the defaulted premiums with interest. To indemnify it against loss the United States shall have a first lien upon any policy receiving the benefits of this Article, subject only to any lien existing at the time the policy became subject to this Act, and no loan or settlement or payment of dividend shall be made by the insurer on such policy which may prejudice the security of such lien. Before any dividend is paid or any loan or settlement is made the written consent of the Bureau of War Risk Insurance must be obtained.

Sec. 410. That in the event that the military service of any person being the holder of a policy receiving the benefits of this Article shall be terminated by death, the amount of any unpaid premiums, with interest at the rate provided for in the policy for policy loans, shall be deducted from the proceeds of the policy and shall be included in the next monthly report of the insurer as premiums paid.

Sec. 411. That if the insured does not within one year after the termination of his period of military service pay to the insurer all past due premiums with interest thereon from their several due dates at the rate provided in the policy for policy loans, the policy shall at the end of such year immediately lapse and become void, and the insurer shall thereupon become liable to pay the cash surrender value thereof, if any: Provided, That if the insured is in the military service at the termination of the war such lapse shall occur and surrender value be payable at the expiration of one year after the termination of the war.

Sec. 412. That at the expiration of one year after the termination of the war there shall be an account stated between each insurer and the United States, in which the following items shall be credited to the insurer:

(1) The total amount of the monthly differences reported under this Article;

(2) The difference between the total interest received by the insurer upon the bonds held by it as security and the total interest upon such monthly differences at the rate of five per centum per annum; and in which there shall be credited to the United States the amount of the cash surrender value of each policy lapsed or forfeited as provided in section four hundred and eleven, but not in any case a greater amount on any policy than the total of the unpaid premiums with interest thereon at the rate provided for in the policy for policy loans.

Sec. 413. That the balance in favor of the insurer shall, in each case, be paid to it by the United States upon the surrender by the insurer of the bonds delivered to it from time to time by the Secretary of the Treasury under the provisions of this Article.

Sec. 414. That this Article shall not apply to any policy which is void or which may at the option of the insurer be voidable, if the insured is in military service, either in this country, or abroad, nor to any policy which as a result of being in military service, either in this country or abroad, provides for the payment of any sum less than the face thereof or for the payment of an additional amount as premium.

Sec. 415. That this Article shall apply only to insurance companies or associations which are required by the law under which they are organized or doing business to maintain a reserve, or, which if not so required, have made or shall make provision for the collection from all those insured in such insurer of a premium to cover the special war risk of those insured persons who are in military service.



ARTICLE V.

TAXES AND PUBLIC LANDS.

Sec. 500. (1) That the provisions of this section shall apply when any taxes or assessments, whether general or special, falling due during the period of military service in respect of real property owned and occupied for dwelling or business purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

(2) When any person in military service, or any person in his behalf, shall file with the collector of taxes, or other officer whose duty it is to enforce the collection of taxes or assessments, an affidavit showing (a) that a tax or assessment has been assessed upon property which is the subject of this section, (b) that such tax or assessment is unpaid, and (c) that by reason of such military service the ability of such person to pay such tax or assessment is materially affected, no sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon an application made therefor by such collector or other officer. The court thereupon may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the war.

(3) When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in military service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the termination of the war; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption.

(4) Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of six per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon.

Sec. 501. That no right to any public lands initiated or acquired prior to entering military service by any person under the homestead laws, the desert-land laws, the mining-land laws, or any other laws of the United States, shall be forfeited or prejudiced by reason of his absence from such land, or of his failure to perform any work or make any improvements thereon, or to do any other act required by any such law during the period of such service. Nothing in this section con-

tained shall be construed to deprive a person in military service or his heirs or devisees of any benefits to which he or they may be entitled under the Act entitled "An Act for the relief of homestead entrymen or settlers who enter the military or naval service of the United States in time of war," approved July twenty-eighth, nineteen hundred and seventeen; the Act entitled "An Act for the protection of desert-land entrymen who enter the military or naval service of the United States in time of war," approved August seventh, nineteen hundred and seventeen; the Act entitled "An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products," approved August tenth, nineteen hundred and seventeen; the joint resolution "To relieve the owners of mining claims who have been mustered into the military or naval service of the United States as officers or enlisted men from performing assessment work during the term of such service," approved July seventeenth, nineteen hundred and seventeen; or any other Act or resolution of Congress: Provided, That nothing in this section contained shall be construed to limit or affect the right of a person in the military service to take any action during his term of service that may be authorized by law, or the regulations of the Interior Department thereunder, for the perfection, defense, or further assertion of rights initiated prior to the date of entering military service, and it shall be lawful for any person while in military service to make any affidavit or submit any proof that may be required by law, or the practice of the General Land Office in connection with the entry, perfection, defense, or further assertion of any rights initiated prior to entering military service, before the officer in immediate command and holding a commission in the branch of the service in which the party is engaged, which affidavits shall be as binding in law and with like penalties as if taken before the Register of the United States Land Office.

ARTICLE VI.

ADMINISTRATIVE REMEDIES.

Sec. 600. That where in any proceeding to enforce a civil right in any court it is made to appear to the satisfaction of the court that any interest, property, or contract has since the date of the approval of this Act been transferred or acquired with intent to delay the just enforcement of such right by taking advantage of this Act, the court shall enter such judgment or make such order as might lawfully be entered or made the provisions of this Act to the contrary notwithstanding.

Sec. 601. (1) That in any proceeding under this Act a certificate signed by The Adjutant General of the Army as to persons in the Army or in any branch of the United States service while serving pursuant to law with the Army, signed by the Chief of the Bureau of Navigation of the Navy Department as to persons in the Navy or in any other branch of the United States service while serving pursuant to law with the Navy, and signed by the Major General, Commandant, United States Marine Corps, as to persons in the Marine Corps, or in any other branch of the United States service while serving pur-

suant to law with the Marine Corps, or signed by an officer designated by any of them, respectively, for the purpose, shall when produced be prima facie evidence as to any of the following facts stated in such certificate:

That a person named has not been, or is, or has been in military service; the time when and the place where such person entered military service, his residence at that time, and the rank, branch, and unit of such service that he entered, the dates within which he was in military service, the monthly pay received by such person at the date of issuing the certificate, the time when and place where such person died in or was discharged from such service.

It shall be the duty of the foregoing officers to furnish such certificate on application, and any such certificate when purporting to be signed by any one of such officers or by any person purporting upon the face of the certificate to have been so authorized shall be prima facie evidence of its contents and of the authority of the signer to issue the same.

- ✓ (2) Where a person in military service has been reported missing he shall be presumed to continue in the service until accounted for, and no period herein limited which begins or ends with the death of such person shall begin or end until the death of such person is in fact reported to or found by the Department of War or Navy, or any court or board thereof, or until such death is found by a court of competent jurisdiction: Provided, That no period herein limited which begins or ends with the death of such person shall be extended hereby beyond a period of six months after the termination of the war.

Sec. 602. That any interlocutory order made by any court under the provisions of this Act may, upon the court's own motion or otherwise, be revoked, modified, or extended by it upon such notice to the parties affected as it may require.

- ✓ Sec. 603. That this Act shall remain in force until the termination of the war, and for six months thereafter: Provided, That wherever under any section or provision of this Act a proceeding, remedy, privilege, stay, limitation, accounting, or other transaction has been authorized or provided, the due exercise or enjoyment of which may extend beyond the period herein fixed for the termination of this Act, such section or provision shall be deemed to continue in full force and effect so long as may be necessary to the exercise or enjoyment of the proceeding, remedy, privilege, stay, limitation, accounting, or transaction aforesaid.

Sec. 604. That this Act may be cited as the Soldiers' and Sailors' Civil Relief Act.

Approved, March 8, 1918.

16. FURLOUGH ACT

[Public—No. 105—65th Congress. S. 3471.]

An Act to authorize the Secretary of War to grant furloughs without pay and allowances to enlisted men of the Army of the United States. [March 16, 1918.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, whenever during the continuance of the present war in the opinion of the Secretary of War the interests of the service or the national security and defense render it necessary or desirable, the Secretary of War be, and he hereby is authorized to grant furloughs to enlisted men of the Army of the United States with or without pay and allowances or with partial pay and allowances, and, for such periods as he may designate, to permit said enlisted men to engage in civil occupations and pursuits: Provided, That such furloughs shall be granted only upon the voluntary application of such enlisted men under regulations to be prescribed by the Secretary of War.

.Approved, March 16, 1918.

17. FEDERAL CONTROL OF CARRIERS ACT

[Public—No. 107—65th Congress. S. 3752.]

An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes. [March 21, 1918.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President, having in time of war taken over the possession, use, control, and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen.

That any railway operating income accruing during the period of Federal control in excess of such just compensation shall remain the property of the United States. In the computation of such income, debits and credits arising from the accounts called in the monthly reports to the Interstate Commerce Commission equipment rents and joint facility rents shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are at the time of the agreement not under Federal control, shall be excluded. If any lines were acquired by, leased to, or consolidated with such railroad or system

between July first, nineteen hundred and fourteen, and December thirty-first, nineteen hundred and seventeen, both inclusive, and separate operating returns to the Interstate Commerce Commission were not made for such lines after such acquisition, lease, or consolidation, there shall (before the average is computed) be added to the total railway operating income of such railroad or system for the three years ended June thirtieth, nineteen hundred and seventeen, the total railway operating income of the lines so acquired, leased, or consolidated, for the period beginning July first, nineteen hundred and fourteen, and ending on the date of such acquisition, lease, or consolidation, or on December thirty-first, nineteen hundred and seventeen, whichever is the earlier. The average annual railway operating income shall be ascertained by the Interstate Commerce Commission and certified by it to the President. Its certificate shall, for the purpose of such agreement, be taken as conclusive of the amount of such average annual railway operating income.

Every such agreement shall provide that any Federal taxes under the Act of October third, nineteen hundred and seventeen, or Acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation (not including, however, assessments for public improvements or taxes assessed on property under construction, and chargeable under the classification of the Interstate Commerce Commission to investment in road and equipment), shall be paid out of revenues derived from railway operations while under Federal control; that all taxes assessed under Federal or any other governmental authority for the period prior to January first, nineteen hundred and eighteen, whenever levied or payable, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation.

Every such agreement shall also contain adequate and appropriate provisions for the maintenance, repair, renewals, and depreciation of the property, for the creation of any reserves or reserve funds found necessary in connection therewith, and for such accounting and adjustments of charges and payments, both during and at the end of Federal control as may be requisite in order that the property of each carrier may be returned to it in substantially as good repair and in substantially as complete equipment as it was in at the beginning of Federal control, and also that the United States may, by deductions from the just compensations or by other proper means and charges, be reimbursed for the cost of any additions, repairs, renewals, and betterments to such property not justly chargeable to the United States; in making such accounting and adjustments, due consideration shall be given to the amounts expended or reserved by each carrier for maintenance, repairs, renewals, and depreciation during the three years ended

June thirtieth, nineteen hundred and seventeen, to the condition of the property at the beginning and at the end of Federal control and to any other pertinent facts and circumstances.

The President is further authorized in such agreement to make all other reasonable provisions, not inconsistent with the provisions of this Act or of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, that he may deem necessary or proper for such Federal control or for the determination of the mutual rights and obligations of the parties to the agreement arising from or out of such Federal control.

If the President shall find that the condition of any carrier was during all or a substantial portion of the period of three years ended June thirtieth, nineteen hundred and seventeen, because of non-operation, receivership, or where recent expenditures for additions or improvements or equipment were not fully reflected in the operating railway income of said three years or a substantial portion thereof, or because of any undeveloped or abnormal conditions, so exceptional as to make the basis of earnings hereinabove provided for plainly inequitable as a fair measure of just compensation, then the President may make with the carrier such agreement for such amount as just compensation as under the circumstances of the particular case he shall find just.

That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within "Federal control," as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act: Provided, however, That nothing in this paragraph shall be construed as including any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic, or sale of power, heat and light, or both.

The agreement shall also provide that the carrier shall accept all the terms and conditions of this Act and any regulation or order made by or through the President under authority of this Act or of that portion of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, which authorizes the President in time of war to take possession, assume control, and utilize systems of transportation.

Sec. 2. That if no such agreement is made, or pending the execution of an agreement, the President may nevertheless pay to any carrier while under Federal control an annual amount, payable in reasonable installments, not exceeding ninety per centum of the estimated annual amount of just compensation, remitting such carrier, in case where no

agreement is made, to its legal rights for any balance claimed to the remedies provided in section three hereof. Any amount thereafter found due such carrier above the amount paid shall bear interest at the rate of six per centum per annum. The acceptance of any benefits under this section shall constitute an acceptance by the carrier of all the provisions of this Act and shall obligate the carrier to pay to the United States, with interest at the rate of six per centum per annum from a date or dates fixed in proceedings under section three, the amount by which the sums received under this section exceed the sum found due in such proceedings.

Sec. 3. That all claims for just compensation not adjusted (as provided in section one) shall, on the application of the President or of any carrier, be submitted to boards, each consisting of three referees to be appointed by the Interstate Commerce Commission, members of which and the official force thereof being eligible for service on such boards without additional compensation. Such boards of referees are hereby authorized to summon witnesses, require the production of records, books, correspondence, documents, memoranda, and other papers, view properties, administer oaths, and may hold hearings in Washington and elsewhere, as their duties and the convenience of the parties may require. In case of disobedience to a subpoena the board may invoke the aid of any district court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, corporation, partnership, or association, issue an order requiring appearance before the board, or the production of documentary evidence if so ordered, or the giving of evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. Such cases may be heard separately or together or by classes, by such boards as the Interstate Commerce Commission in the first instance, or any board of referees to which any such cases shall be referred may determine. Said boards shall give full hearings to such carriers and to the United States; shall consider all the facts and circumstances, and shall report as soon as practicable in each case to the President the just compensation, calculated on an annual basis and otherwise in such form as to be convenient and available for the making of such agreement as is authorized in section one. The President is authorized to enter into an agreement with such carrier for just compensation upon a basis not in excess of that reported by such board, and may include therein provisions similar to those authorized under section one. Failing such agreement, either the United States or such carrier may file a petition in the Court of Claims for the purpose of determining the amount of such just compensation, and in the proceedings in said court the report of said referees shall be prima facie evidence of the amount of just compensation and of the facts therein stated. Proceedings in the Court of Claims under this section shall be given precedence and expedited in every practicable way.

Sec. 4. That the just compensation that may be determined as

hereinbefore provided by agreement or that may be adjudicated by the Court of Claims, shall be increased by an amount reckoned at a reasonable rate per centum to be fixed by the President upon the cost of any additions and betterments, less retirements, and upon the cost of road extensions to the property of such carrier made by such carrier with the approval of or by order of the President while such property is under Federal control.

Sec. 5. That no carrier while under Federal control shall, without the prior approval of the President, declare or pay any dividend in excess of its regular rate of dividends during the three years ended June thirtieth, nineteen hundred and seventeen: Provided, however, That such carriers as have paid no regular dividends or no dividends during said period may, with the prior approval of the President, pay dividends at such rate as the President may determine.

Sec. 6. That the sum of \$500,000,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, which, together with any funds available from any operating income of said carriers, may be used by the President as a revolving fund for the purpose of paying the expenses of the Federal control, and so far as necessary the amount of just compensation, and to provide terminals, motive power, cars, and other necessary equipment, such terminals, motive power, cars, and equipment to be used and accounted for as the President may direct and to be disposed of as Congress may hereafter by law provide.

The President may also make or order any carrier to make any additions, betterments, or road extensions, and to provide terminals, motive power, cars and other equipment necessary or desirable for war purposes or in the public interest on or in connection with the property of any carrier. He may from said revolving fund advance to such carrier all or any part of the expense of such additions, betterments, or road extensions, and to provide terminals, motive power, cars, and other necessary equipment so ordered and constructed by such carrier or by the President, such advances to be charged against such carrier and to bear interest at such rate and be payable on such terms as may be determined by the President, to the end that the United States may be fully reimbursed for any sums so advanced.

Any loss claimed by any carrier by reason of any such additions, betterments, or road extensions so ordered and constructed may be determined by agreement between the President and such carrier; failing such agreement the amount of such loss shall be ascertained as provided in section three hereof.

From said revolving fund the President may expend such an amount as he may deem necessary or desirable for the utilization and operation of canals, or for the purchase, construction, or utilization and operation of boats, barges, tugs, and other transportation facilities on the inland, canal, and coastwise waterways, and may in the operation and use of such facilities create or employ such agencies and enter into such contracts and agreements as he shall deem in the public interest.

Sec. 7. That for the purpose of providing funds requisite for maturing obligations or for other legal and proper expenditures, or for

reorganizing railroads in receivership, carriers may, during the period of Federal control, issue such bonds, notes, equipment trust certificates, stock, and other forms of securities, secured or unsecured by mortgage, as the President may first approve as consistent with the public interest. The President may, out of the revolving fund created by this Act, purchase for the United States all or any part of such securities at prices not exceeding par, and may sell such securities whenever in his judgment it is desirable at prices not less than the cost thereof. Any securities so purchased shall be held by the Secretary of the Treasury, who shall, under the direction of the President, represent the United States in all matters in connection therewith in the same manner as a private holder thereof. The President shall each year as soon as practicable after January first, cause a detailed report to be submitted to the Congress of all receipts and expenditures made under this section and section six during the preceding calendar year.

Sec. 8. That the President may execute any of the powers herein and heretofore granted him with relation to Federal control through such agencies as he may determine, and may fix the reasonable compensation for the performance of services in connection therewith, and may avail himself of the advice, assistance, and cooperation of the Interstate Commerce Commission and of the members and employees thereof, and may also call upon any department, commission, or board of the Government for such services as he may deem expedient. But no such official or employee of the United States shall receive any additional compensation for such services except as now permitted by law.

Sec. 9. That the provisions of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, shall remain in force and effect except as expressly modified and restricted by this Act; and the President, in addition to the powers conferred by this Act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred. The provisions of this Act shall also apply to any carriers to which Federal control may be hereafter extended.

Sec. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred be-

cause of such Federal control or of any Act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control.

That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition.

After full hearing the commission may make such findings and orders as are authorized by the Act to regulate commerce as amended and said findings and orders shall be enforced as provided in said Act: Provided, however, That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make.

Sec. 11. That every person or corporation, whether carrier or shipper, or any receiver, trustee, lessee, agent, or person acting for or employed by a carrier or shipper, or other person, who shall knowingly violate or fail to observe any of the provisions of this Act, or shall knowingly interfere with or impede the possession, use, operation, or control of any railroad property, railroad, or transportation system hitherto or hereafter taken over by the President, or shall knowingly violate any of the provisions of any order or regulation made in pursuance of this Act, shall be guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of not more than \$5,000, or, if a person, by imprisonment for not more than two years, or both. Each independent transaction constituting a violation of, or a failure

to observe, any of the provisions of this Act, or any order entered in pursuance hereof, shall constitute a separate offense. For the taking or conversion to his own use or the embezzlement of money or property derived from or used in connection with the possession, use, or operation of said railroads or transportation systems, the criminal statutes of the United States, as well as the criminal statutes of the various States where applicable, shall apply to all officers, agents, and employees engaged in said railroad and transportation service, while the same is under Federal control, to the same extent as to persons employed in the regular service of the United States. Prosecutions for violations of this Act or of any order entered hereunder shall be in the district courts of the United States, under the direction of the Attorney General, in accordance with the procedure for the collection and imposing of fines and penalties now existing in said courts.

Sec. 12. That moneys and other property derived from the operation of the carriers during Federal control are hereby declared to be the property of the United States. Unless otherwise directed by the President, such moneys shall not be covered into the Treasury, but such moneys and property shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner and form as before Federal control. Disbursements therefrom shall, without further appropriation, be made in the same manner as before Federal control and for such purposes as under the Interstate Commerce Commission classification of accounts in force on December twenty-seventh, nineteen hundred and seventeen, are chargeable to operating expenses or to railway tax accruals and for such other purposes in connection with Federal control as the President may direct, except that taxes under Titles One and Two of the Act entitled "An Act to provide revenue to defray war expenses, and for other purposes," approved October third, nineteen hundred and seventeen, or any Act in addition thereto or in amendment thereof, shall be paid by the carrier out of its own funds. If Federal control begins or ends during the tax year for which any taxes so chargeable to railway tax accruals are assessed, the taxes for such year shall be apportioned to the date of the beginning or ending of such Federal control, and disbursements shall be made only for that portion of such taxes as is due for the part of such tax year which falls within the period of Federal control.

At such periods as the President may direct, the books shall be closed and the balance of revenues over disbursements shall be covered into the Treasury of the United States to the credit of the revolving fund created by this Act. If such revenues are insufficient to meet such disbursements, the deficit shall be paid out of such revolving fund in such manner as the President may direct.

Sec. 13. That all pending cases in the courts of the United States affecting railroads or other transportation systems brought under the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended and supplemented, including the commodities clause, so called, or under the Act to protect trade and commerce against unlawful restraints and monopolies, approved July sec-

ond, eighteen hundred and ninety, and amendments thereto, shall proceed to final determination as soon as may be, as if the United States had not assumed control of transportation systems; but in any such case the court having jurisdiction may, upon the application of the United States, stay execution of final judgment or decree until such time as it shall deem proper.

Sec. 14. That the Federal control of railroads and transportation systems herein and heretofore provided for shall continue for and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: Provided, however, That the President may, prior to July first, nineteen hundred and eighteen, relinquish control of all or any part of any railroad or system of transportation, further Federal control of which the President shall deem not needful or desirable; and the President may at any time during the period of Federal control agree with the owners thereof to relinquish all or any part of any railroad or system of transportation. The President may relinquish all railroads and systems of transportation under Federal control at any time he shall deem such action needful or desirable. No right to compensation shall accrue to such owners from and after the date of relinquishment for the property so relinquished.

Sec. 15. That nothing in this Act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds.

Sec. 16. That this Act is expressly declared to be emergency legislation enacted to meet conditions growing out of war; and nothing herein is to be construed as expressing or prejudicing the future policy of the Federal Government concerning the ownership, control, or regulation of carriers or the method or basis of the capitalization thereof.

Approved, March 21, 1918.

18. FOREIGN CLAIMS ACT

[Public—No. 133—65th Congress. H. R. 9001.]

An Act to give indemnity for damages caused by American forces abroad. [April 18, 1918.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That claims of inhabitants of France or of any other European country not an enemy or ally of an enemy for damages caused by American military forces may be presented to any officer designated by the President, and when approved by such an officer shall be paid under regulations made by the Secretary of War.

Sec. 2. That claims under this statute shall not be approved unless they would be payable according to the law or practice governing the military forces of the country in which they occur.

Sec. 3. That hereafter appropriations for the incidental expenses of the Quartermaster Corps shall be available for paying the claims herein described.

Sec. 4. That this statute does not supersede other modes of indemnity now in existence and does not diminish responsibility of any member of the military forces to the person injured or to the United States.

Approved, April 18, 1918.¹

19. WAR MATERIALS DESTRUCTION ACT

[Public—No. 135—65th Congress. S. 383.]

An Act to punish the willful injury or destruction of war material, or of war premises or utilities used in connection with war material, and for other purposes. [April 20, 1918.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the words "war material," as used herein, shall include arms, armament, ammunition, livestock, stores of clothing, food, foodstuffs, or fuel; and shall also include supplies, munitions, and all other articles of whatever description, and any part or ingredient thereof, intended for, adapted to, or suitable for the use of the United States, or any associate nation, in connection with the conduct of the war.

The words "war premises," as used herein, shall include all buildings, grounds, mines, or other places wherein such war material is being produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported, together with all machinery and appliances therein contained; and all forts, arsenals, navy yards,

¹ Senate Bill 4945, to amend the "Act to give Indemnity," etc., approved April 18, 1918:

"Be it enacted, etc., That an act entitled 'An Act to give indemnity for damages caused by American forces abroad,' approved April 18, 1918, be, and the same is hereby, amended by adding to the title thereof the words 'and for other purposes' and by adding a new section, as follows:

"Sec. 5. That claims of inhabitants of France or of any other foreign country not an enemy or ally of an enemy of the United States against any officer, enlisted man, or other person in the United States Army, who has died, or hereafter shall die, during service overseas, for unpaid indebtedness incurred for current personal expenses of board, lodging, fuel, light, laundry, personal wearing apparel, or other items of ordinary current living expenses may be presented, approved, and paid as provided by Section 1 of this act in cases of claims for damages; and whenever any such claim shall have been paid as aforesaid the Government shall reimburse itself therefor by deducting the amount of such payment from any pay or allowance due the deceased at the time of his death: Provided, That the provisions of section 2 of this act shall not apply to the claims described in this section."

From the Report of the Senate Committee on Military Affairs:

"General Pershing states that it is highly desirable for the prestige of our forces abroad that provision should be made for the prompt settlement of debts of deceased members of our forces. The bill as drafted will cover cases that may arise in our expeditionary forces in any part of the world now or in future wars." [Congressional Record, Oct. 10, 1918, p. 12161. The bill was passed on that day in the Senate.]

camps, prisons, or other military or naval stations of the United States, or any associate nation.

The words "war utilities," as used herein, shall include all railroads, railways, electric lines, roads of whatever description, railroad or railway fixture, canal, lock, dam, wharf, pier, dock, bridge, building, structure, engine, machine, mechanical contrivance, car, vehicle, boat, or aircraft, or any other means of transportation whatsoever, whereon or whereby such war material or any troops of the United States, or of any associate nation, are being or may be transported either within the limits of the United States or upon the high seas; and all dams, reservoirs, aqueducts, water and gas mains and pipes, structures and buildings, whereby or in connection with which water or gas is being furnished, or may be furnished, to any war premises or to the military or naval forces of the United States, or any associate nation, and all electric light and power, steam or pneumatic power, telephone and telegraph plants, poles, wires, and fixtures and wireless stations, and the buildings connected with the maintenance and operation thereof used to supply water, light, heat, power, or facilities of communication to any war premises or to the military or naval forces of the United States, or any associate nation.

The words "United States" shall include the Canal Zone and all territory and waters, continental and insular, subject to the jurisdiction of the United States.

The words "associate nation," as used in this Act shall be deemed to mean any nation at war with any nation with which the United States is at war.

Sec. 2. That when the United States is at war, whoever, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, or whoever, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, shall willfully injure or destroy, or shall attempt to so injure or destroy, any war material, war premises, or war utilities, as herein defined, shall, upon conviction thereof be fined not more than \$10,000 or imprisoned not more than thirty years, or both.

Sec. 3. That when the United States is at war, whoever, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, or whoever, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, shall willfully make or cause to be made in a defective manner, or attempt to make or cause to be made in a defective manner, any war material, as herein defined, or any tool, implement, machine, utensil, or receptacle used or employed in making, producing, manufacturing or repairing any such war material, as herein defined, shall, upon conviction thereof, be fined not more than \$10,000 or imprisoned not more than thirty years, or both.

Approved, April 20, 1918.

20. EXECUTIVE COORDINATION ACT

[Public—No. 152—65th Congress. S. 3771.]

An Act authorizing the President to coordinate or consolidate executive bureaus, agencies, and offices, and for other purposes, in the interest of economy and the more efficient concentration of the Government. [May 20, 1918.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the land and naval forces the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this Act, and to this end is authorized to make such regulations and to issue such orders as he may deem necessary, which regulations and orders shall be in writing and shall be filed with the head of the department affected and constitute a public record: Provided, That this Act shall remain in force during the continuance of the present war and for six months after the termination of the war by the proclamation of the treaty of peace, or at such earlier time as the President may designate: Provided further, That the termination of this Act shall not affect any act done or any right or obligation accruing or accrued pursuant to this act and during the time that this Act is in force: Provided further, That the authority by this Act granted shall be exercised only in matters relating to the conduct of the present war.

Sec. 2. That in carrying out the purposes of this Act the President is authorized to utilize, coordinate, or consolidate any executive or administrative commissions, bureaus, agencies, offices, or officers now existing by law, to transfer any duties or powers from one existing department, commission, bureau, agency, office, or officer to another, to transfer the personnel thereof or any part of it either by detail or assignment, together with the whole or any part of the records and public property belonging thereto.

Sec. 3. That the President is further authorized to establish an executive agency which may exercise such jurisdiction and control over the production of aeroplanes, aeroplane engines, and aircraft equipment as in his judgment may be advantageous; and, further, to transfer to such agency, for its use, all or any moneys heretofore appropriated for the production of aeroplanes, aeroplane engines, and aircraft equipment.

Sec. 4. That for the purpose of carrying out the provisions of this Act, any moneys heretofore and hereafter appropriated for the use of any executive department, commission, bureau, agency, office, or

officer shall be expended only for the purposes for which it was appropriated under the direction of such other agency as may be directed by the President hereunder to perform and execute said function.

Sec. 5. That should the President, in redistributing the functions among the executive agencies as provided in this Act, conclude that any bureau should be abolished and it or their duties and functions conferred upon some other department or bureau or eliminated entirely, he shall report his conclusions to Congress with such recommendations as he may deem proper.

Sec. 6. That all laws or parts of laws conflicting with the provisions of this Act are to the extent of such conflict suspended while this Act is in force.

Upon the termination of this Act all executive or administrative agencies, departments, commissions, bureaus, offices, or officers shall exercise the same functions, duties, and powers as heretofore or as hereafter by law may be provided, any authorization of the President under this Act to the contrary notwithstanding.

Approved, May 20, 1918.

21. ARMY APPROPRIATIONS ACT

[Public—No. 193—65th Congress. H. R. 12281.]

An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and nineteen. [July 9, 1918.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the support of the Army for the year ending June thirtieth, nineteen hundred and nineteen:

Vocational training: For the employment of the necessary civilian instructors in the most important trades, for the purchase of carpenter's, machinist's, plumber's, mason's, electrician's, and such other tools and equipment as may be required, including machines used in connection with the trades for the purchase of material and other supplies necessary for instruction and training purposes and the construction of such buildings needed for vocational training in agriculture for shops, storage, and shelter of machinery as may be necessary to carry out the provisions of section twenty-seven of the Act approved June third, nineteen hundred and sixteen, authorizing, in addition to the military training of soldiers while in the active service, means for securing an opportunity to study and receive instruction upon educational lines of such character as to increase their military efficiency and enable them to return to civil life better equipped for industrial, commercial, and general business occupations, part of this instruction to consist of vocational education either in agriculture or the mechanic arts, \$75,000.

Increase in Medical Department: That the Medical Department of the Regular Army be, and is hereby, increased by one Assistant Surgeon General, for service abroad during the present war, who shall

have the rank of major general, and two Assistant Surgeons General, who shall have the rank of brigadier general, all of whom shall be appointed from the Medical Corps of the Regular Army.

That the President may nominate and appoint in the Medical Department of the National Army, by and with the advice and consent of the Senate, from the Medical Reserve Corps of the Regular Army not to exceed two major generals and four brigadier generals.

That the commissioned officers of the Medical Corps of the Regular Army, none of whom shall have rank above that of colonel, shall be proportionately distributed in the several grades as now provided by law.

That the commissioned officers of the Medical Reserve Corps of the Regular Army, none of whom shall have rank above that of colonel, shall be proportionately distributed in the several grades as now provided by law for the Medical Corps of the Regular Army: Provided, That nothing in this Act shall be held or construed so as to discharge any officer of the Regular Army or deprive him of a commission which he now holds therein.

Slavic Legion: That under such regulations as the President may prescribe, a force of volunteer troops in such unit or units as he may direct may be raised to be composed of Jugo-Slavs, Czecho Slovaks, and Ruthenians (Ukrainians) belonging to the oppressed races of the Austro-Hungarian or German Empire resident in the United States but not citizens thereof nor subject to the draft. Such force shall be known as the Slavic Legion or by such other description as the President may prescribe. No man shall be enlisted in it until he has furnished satisfactory evidence that he will faithfully and loyally serve the cause of the United States and that he desires to fight the Imperial governments of Germany and Austria-Hungary, and the allies thereof. The force so raised and duly sworn into the service may be equipped, maintained, and trained with our own troops or separately as the President may direct and thereafter may be transported to such field of action as the President may direct to be used against the common enemy in connection with our own troops or with those of any nation associated with the United States in the present war; and the several items of expense involved in the equipment, maintenance, training, and transportation of such force may be paid from the respective appropriations herein made or from any subsequent appropriations for the same: Provided, That American citizens of Austrian or German birth, or who were born in alien enemy territory, who have passed the necessary examination and whose loyalty is unquestioned, may, in the discretion of the Commander in Chief of the Army and Navy, be commissioned in the United States Army or Navy.

Medals of honor, distinguished-service crosses, and distinguished-service medals: That the provisions of existing law relating to the award of medals of honor to officers, noncommissioned officers, and privates of the Army be, and they hereby are, amended so that the President is authorized to present, in the name of the Congress, a medal of honor only to each person who, while an officer or enlisted man of the Army, shall hereafter, in action involving actual conflict

with an enemy, distinguish himself conspicuously by gallantry and intrepidity at the risk of his life above and beyond the call of duty.

That the President be, and he is hereby, further authorized to present, but not in the name of Congress, a distinguished-service cross of appropriate design and a ribbon, together with a rosette or other device, to be worn in lieu thereof, to any person who, while serving in any capacity with the Army of the United States since the sixth day of April, nineteen hundred and seventeen, has distinguished, or who shall hereafter distinguish, himself or herself by extraordinary heroism in connection with military operations against an armed enemy.

That the President be, and he is hereby, further authorized to present, but not in the name of Congress, a distinguished-service medal of appropriate design and a ribbon, together with a rosette or other device, to be worn in lieu thereof, to any person who, while serving in any capacity with the Army of the United States since the sixth day of April, nineteen hundred and seventeen, has distinguished, or who hereafter shall distinguish, himself or herself by exceptionally meritorious service to the Government in a duty of great responsibility; and said distinguished-service medal shall also be issued to all enlisted men of the Army to whom the certificate of merit has been granted up to and including the date of the passage of this Act under the provisions of previously existing law, in lieu of such certificate of merit, and after the passage of this Act the award of the certificate of merit for distinguished service shall cease; and additional pay heretofore authorized by law for holders of the certificate of merit shall not be paid to them beyond the date of the award of the distinguished-service medal in lieu thereof as aforesaid.

That each enlisted man of the Army to whom there has been or shall be awarded a medal of honor, a distinguished-service cross, or a distinguished-service medal shall, for each such award, be entitled to additional pay at the rate of \$2 per month from the date of the distinguished act or service on which the award is based, and each bar, or other suitable device, in lieu of a medal of honor, a distinguished-service cross, or a distinguished-service medal, as hereinafter provided for, shall entitle him to further additional pay at the rate of \$2 per month from the date of the distinguished act or service for which the bar is awarded, and said additional pay shall continue throughout his active service, whether such service shall or shall not be continuous; but when the award is in lieu of the certificate of merit, as provided for in section three hereof, the additional pay shall begin with the date of the award.

That no more than one medal of honor or one distinguished-service cross or one distinguished-service medal shall be issued to any one person; but for each succeeding deed or act sufficient to justify the award of a medal of honor or a distinguished-service cross or a distinguished-service medal, respectively, the President may award a suitable bar, or other suitable device, to be worn as he shall direct; and for each other citation of an officer or enlisted man for gallantry in action published in orders issued from the headquarters of a force commanded by a general officer he shall be entitled to wear, as the

President shall direct, a silver star three-sixteenths of an inch in diameter.

That the Secretary of War be, and he is hereby, authorized to expend from the appropriations for contingent expenses of his department from time to time so much as may be necessary to defray the cost of the medals of honor, distinguished-service crosses, distinguished-service medals, bars, rosettes, and other devices hereinbefore provided for.

That whenever a medal, cross, bar, ribbon, rosette, or other device presented under the provisions of this Act shall have been lost, destroyed, or rendered unfit for use, without fault or neglect on the part of the person to whom it was awarded, such medal, cross, bar, ribbon, rosette, or device shall be replaced without charge therefor.

That, except as otherwise prescribed herein, no medals of honor, distinguished-service cross, distinguished-service medal, or bar or other suitable device in lieu of either of said medals or of said cross, shall be issued to any person after more than three years from the date of the act justifying the award thereof, nor unless a specific statement or report distinctly setting forth the distinguished service and suggesting or recommending official recognition thereof shall have been made at the time of the distinguished service or within two years thereafter, nor unless it shall appear from official records in the War Department that such person has so distinguished himself as to entitle him thereto; but in case an individual who shall distinguish himself dies before the making of the award to which he may be entitled, the award may nevertheless be made and the medal or cross or the bar or other emblem or device presented, within three years from the date of the act justifying the award thereof, to such representative of the deceased as the President may designate; but no medal, cross, bar, or other device, hereinbefore authorized, shall be awarded or presented to any individual whose entire service subsequently to the time he distinguished himself shall not have been honorable; but in cases of officers and enlisted men now in the Army for whom the award of the medal of honor has been recommended in full compliance with then existing regulations but on account of services which, though insufficient fully to justify the award of the medal of honor, appear to have been such as to justify the award of the distinguished-service cross or distinguished-service medal hereinbefore provided for, such cases may be considered and acted upon under the provisions of this Act authorizing the award of the distinguished-service cross and distinguished-service medal, notwithstanding that said services may have been rendered more than three years before said cases shall have been considered as authorized by this Act, but all consideration of and action upon any of said cases shall be based exclusively upon official records now on file in the War Department; and in the cases of officers and enlisted men now in the Army who have been mentioned in orders, now a part of official records, for extraordinary heroism or especially meritorious services, such as to justify the award of the distinguished-service cross or the distinguished-service medal hereinbefore provided for, such cases may be considered and acted on under the provisions of this Act, notwithstanding that said act or services may have been rendered more than three years before

said cases shall have been considered as authorized by this Act, but all consideration of and action upon any said cases shall be based exclusively upon official records of the War Department.

That the President be, and he is hereby, authorized to delegate, under such conditions, regulations, and limitations as he shall prescribe, to the commanding general of a separate army or higher unit in the field, the power conferred upon him by this Act to award the medal of honor, the distinguished-service cross, and the distinguished-service medal; and he is further authorized to make from time to time any and all rules, regulations, and orders which he shall deem necessary to carry into effect the provisions of this Act and to execute the full purpose and intention thereof.

That American citizens who have received, since August first, nineteen hundred and fourteen, decorations or medals for distinguished service in the armies or in connection with the field service of those nations engaged in war against the Imperial German Government, shall, on entering the military service of the United States, be permitted to wear such medals or decorations.

That any and all members of the military forces of the United States serving in the present war be, and they are hereby, permitted and authorized to accept during the present war or within one year thereafter, from the Government of any of the countries engaged in war with any country with which the United States is or shall be concurrently likewise engaged in war, such decorations, when tendered, as are conferred by such Government upon the members of its own military forces; and the consent of Congress required therefor by clause eight of section nine of Article I of the Constitution is hereby expressly granted: Provided, That any officer or enlisted man of the military forces of the United States is hereby authorized to accept and wear any medal or decoration heretofore bestowed by the Government of any of the nations concurrently engaged with the United States in the present war.

That the President is authorized, under regulations to be prescribed by him, to confer such medals and decorations as may be authorized in the military service of the United States upon officers and enlisted men of the military forces of the countries concurrently engaged with the United States in the present war.

CHAPTER VI.

Claims of enlisted men for loss of private property: That the Act entitled "An Act to provide for the settlement of the claims of officers and enlisted men of the Army, for loss of private property destroyed in the military service of the United States," approved March third, eighteen hundred and eighty-five (chapter three hundred and thirty-five, Twenty-third Statutes, page three hundred and fifty), be, and the same is hereby, amended to read as follows:

"Sec. 1. That private property belonging to officers, enlisted men, and members of the Nurse Corps (female) of the Army, including all prescribed articles of equipment and clothing which they are required by law or regulations to own and use in the performance of their duties, and horses and equipment required by law or regulations to be

provided by mounted officers, which since the fifth day of April, nineteen hundred and seventeen, has been or shall hereafter be lost, damaged, or destroyed in the military service shall be replaced, or the damage thereto or its value recouped to the owner as hereinafter provided, when such loss, damage, or destruction has occurred or shall hereafter occur in any of the following circumstances:

"First. When such loss or destruction was without fault or negligence on the part of the owner.

"Second. When such private property so lost or destroyed was shipped on board an unseaworthy vessel by order of an officer authorized to give such order or direct such shipment.

"Third. When it appears that such private property was so lost or destroyed in consequence of its owner having given his attention to the saving of property belonging to the United States which was in danger at the same time and in similar circumstances.

"Fourth. When during travel under orders the regulation allowance of baggage transferred by a common carrier is lost or damaged; but replacement or recoupment in these circumstances shall be limited to the extent of such loss or damage over and above the amount recoverable from said carrier.

"Fifth. When such private property is destroyed or captured by the enemy, or is destroyed to prevent its falling into the hands of the enemy, or is abandoned on account of lack of transportation or by reason of military emergency requiring its abandonment, or is otherwise lost in the field during campaign.

"Sec. 2. That, except as to such property as by law or regulations is required to be possessed and used by officers, enlisted men, and members of the Nurse Corps (female), respectively, the liability of the Government under this chapter shall be limited to damage to or loss of such articles of personal property as the Secretary of War shall decide or declare to be reasonable, useful, necessary, and proper for officers, enlisted men, or members of the Nurse Corps (female), respectively, as the case may be, while in quarters, engaged in the public service, in the line of duty.

"Sec. 3. That the proper accounting officers of the Treasury be, and they are hereby, authorized and directed to examine into, ascertain and determine the value of the property lost, destroyed, captured, or abandoned as specified in the foregoing sections, or the amount of the damage thereto, as the case may be; and the amount of such value or damage so ascertained and determined shall be paid out of any money in the Treasury not otherwise appropriated: Provided, That in time of war or of operations during public disaster such property lost, destroyed, captured, or abandoned, or so damaged as to be unfit for service, shall be replaced in kind from Government property on hand, or adequate commutation given therefor when replacement in kind can not be made, or can not be made within a reasonable time, by the supply officer or quartermaster of the organization to which the person entitled thereto belongs or with which he is serving upon the order of the commanding officer thereof.

"Sec. 4. That the tender of replacement or of commutation or the determination made by the proper accounting officers of the Treasury upon a claim presented as provided for in the foregoing section, shall

constitute a final determination of any claim cognizable under this chapter, and such claim shall not thereafter be reopened or considered.

"Sec. 5. That no claim arising under this chapter shall be considered unless made within two years from the time that it accrued; except that when a claim accrues in time of war, or when war intervenes within two years after its accrual, such claim may be presented within two years after peace is established."

CHAPTER X.

Amending the Articles of War: That articles fifty-two, fifty-three, fifty-seven, and one hundred and twelve of section thirteen hundred and forty-two of the Revised Statutes of the United States, as amended by the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, be, and the same are hereby, amended to read as follows:

"Art. 52. *Suspension of sentences.*—The authority competent to order the execution of the sentence of a court-martial may, at the time of the approval of such sentence, suspend the execution, in whole or in part, of any such sentence as does not extend to death, and may restore the person under sentence to duty during such suspension. A sentence, or any part thereof, which has been so suspended may be remitted, in whole or in part, except in cases of persons confined in the United States Disciplinary Barracks or its branches, by the officer who suspended the same, by his successor in office, or by any officer exercising appropriate court-martial jurisdiction over the command in which the person under sentence may be serving at the time, and, subject to the foregoing exceptions the same authority may vacate the order of suspension at any time and order the execution of the sentence or the suspended part thereof in so far as the same shall not have been previously remitted. The death or honorable discharge of a person under suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence.

"Art. 53. *Execution or remission—Confinement in disciplinary barracks.*—When a sentence of dishonorable discharge has been suspended until the soldier's release from confinement, the execution or remission of any part of his sentence shall, if the soldier be confined in the United States Disciplinary Barracks, or any branch thereof, be directed by the Secretary of War."

"Art. 57. *False returns—Omission to render returns.*—Every officer commanding a regiment, an independent troop, battery, or company, or a garrison shall, in the beginning of every month, transmit through the proper channels, to the Department of War, an exact return of the same. Every officer whose duty it is to render to the War Department or other superior authority a return of the state of the troops under his command, or of the arms, ammunition, clothing, funds, or other property thereunto belonging, who knowingly makes a false return thereof shall be dismissed from the service and suffer

such other punishment as a court-martial may direct. And any officer who, through neglect or design, omits to render such return shall be punished as a court-martial may direct."

"Art. 112. *Effects of deceased persons—Disposition of.*—In case of the death of any person subject to military law, the commanding officer of the place of command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters, and if no legal representative or widow be present, the commanding officer shall direct a summary court to secure all such effects; and said summary courts shall have authority to collect and receive any debts due decedent's estate by local debtors; and as soon as practicable after the collection of such effects said summary court shall transmit such effects, and any money collected, through the Quartermaster Department, at Government expense to the widow or legal representative of the deceased, if such be found by said court, or to his son, daughter, father, mother, brother, or sister, in the order named, if such be found by said court, or to the beneficiary named by the deceased, if such be found by said court, and such court shall thereupon make to the War Department a full report of its transactions; but if there be none of the persons hereinabove named, or such persons or their addresses are not known to, or readily ascertainable by, said court, and the court shall so find, said summary court shall have authority to convert into cash, by public or private sale, not earlier than thirty days after the death of the deceased, all effects of the deceased, except sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes; and as soon as practicable after converting such effects into cash said summary court shall deposit with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposits, any will or other papers of value belonging to the deceased, any sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes, together with an inventory of the effects secured by said summary court, and a full account of its transactions to the War Department for transmission to the Auditor for the War Department for action as authorized by law in the settlement of the accounts of deceased officers and enlisted men of the Army.

"The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia where sent from the home for treatment."

CHAPTER XI.

Method of determining quotas for military service: That in the determination of quotas for the several States, Territories, and the District of Columbia, or subdivisions thereof, to be raised for military service under the terms of the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen, the provisions of the joint resolution approved May sixteenth, nineteen hundred and eighteen, providing for the calling

into military service of certain classes of persons registered and liable for military service under the said Act, shall apply to any or all forces heretofore or hereafter raised under the provisions of said Act for any State, Territory, District, or subdivision thereof, from and after the time when such State, Territory, District, or subdivision thereof has completed or completes its quota of forces called and furnished under the President's proclamation dated July twelfth, nineteen hundred and seventeen.

CHAPTER XII.

Registration and drafting of aliens: That the President may by proclamation set a day or days and place or places for the registration for military service of male aliens within designated ages residing within the United States who are citizens or subjects of a foreign country with whose Government the United States has concluded or hereafter concludes a convention or agreement in accordance with the terms of which its citizens or subjects within designated ages, residing within the United States, become under certain conditions liable to be drafted into the military service of the United States; that upon proclamation by the President stating the time and place of such registration it shall be the duty of any such alien, unless exempted from registration by the terms of the President's proclamation, to present himself for and submit to registration under the provisions of the Act approved May eighteenth, nineteen hundred and seventeen, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," and all amendments thereto, and he shall thereupon be registered in the same manner as those previously registered under the terms of said Act; and every such alien shall be deemed to have notice of the requirements of said Act and this joint resolution upon the publication by the President of any such proclamation, and any such alien who shall willfully fail or refuse to present himself for registration or to submit thereto shall be subject to all the provisions and liable to all the penalties provided in said Act or any amendment thereto.

Sec. 2. That any such alien, when registered, shall be and remain liable to military service in the forces of the United States and subject to draft under the provisions of said convention or agreement and of said Act and all amendments thereto, and subject to such regulations as the President may have prescribed or may prescribe under the terms thereof, unless during the period specified in the convention or agreement concluded with the country whereof he is a citizen or subject and designated in the President's proclamation, he shall have enlisted or enrolled in the military forces of his own country or returned to his own country for the purpose of enlisting or enrolling in its military forces, or unless the country whereof he is a citizen or subject, through its diplomatic representatives, in accordance with the terms of the convention or agreement concluded between the United States and such foreign country, shall issue to such alien a certificate of exemption from military service.

Sec. 3. That any such alien, after the expiration of the time fixed

by the President's proclamation within which he may enlist or enroll in the military forces of his own country, return to his own country for the purpose of military service, or be exempted through the diplomatic representative of the country whereof he is a citizen or subject, shall be and remain subject in all respects to the terms, provisions, liabilities, and penalties of said Act and all amendments thereto, except as modified by the terms of the convention or agreement concluded between the United States and the country whereof such alien is a citizen or subject, and shall be subject to such regulations as the President may have prescribed or may prescribe under the terms of said Act.

Sec. 4. That the second sentence of section two of the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen, be, and is hereby, amended to read as follows:

"That such draft as herein provided shall be based upon liability to military service of all male citizens or male persons not alien enemies who have declared their intention to become citizens between the ages of twenty-one and thirty years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act: Provided, That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States."

CHAPTER XIII.

Raising the age limit for volunteer duty in the staff corps: That the first sentence of section seven of the Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen, be, and the same is hereby, amended to read as follows:

"That the qualifications and conditions for voluntary enlistment as herein provided shall be the same as those prescribed by existing law for enlistments in the Regular Army, except that recruits for service in the staff corps and departments may be accepted who are between the ages of forty-one and fifty-five years, both inclusive, at the time of their enlistment, and that all other recruits must be between the ages of eighteen and forty years, both inclusive, at the time of their enlistment; and such enlistment shall be for the period of the existing emergency unless sooner discharged."

CHAPTER XIV.

Prohibiting prostitution near cantonments: That section thirteen of the Act entitled "An Act to authorize the President to increase

temporarily the Military Establishment of the United States," approved May eighteenth, nineteen hundred and seventeen, be, and the same is hereby, amended to read as follows, subject to the same modifications as prescribed in the Act approved October sixth, nineteen hundred and seventeen:

"Sec. 13. That during the present emergency it shall be unlawful, within such reasonable distance of any military camp, station, fort, post, cantonment, training or mobilization place as the Secretary of War shall determine to be needful to the efficiency and welfare of the Army, and shall designate and publish in general orders or bulletins, to engage in prostitution or to aid or abet prostitution or to procure or solicit for purposes of prostitution, or to keep or set up a house of ill fame, brothel, or bawdy house, or to receive any person for purposes of lewdness, assignation, or prostitution into any vehicle, conveyance, place, structure, or building, or to permit any person to remain for purposes of lewdness, assignation, or prostitution in any vehicle, conveyance, place, structure, or building; and any person, corporation, partnership, or association violating the provisions of this chapter shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than \$1,000, or by imprisonment for not more than one year, or by both such fine and imprisonment, and any person subject to military law violating this chapter shall be punished as provided by the Articles of War; and the Secretary of War is hereby authorized, empowered, and directed to do everything by him deemed necessary to suppress and prevent violation thereof."

CHAPTER XVII.

Amending the National Defense Act, and so forth: That certain sections of the Act entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June third, nineteen hundred and sixteen, be, and the same are hereby, amended as follows:

That section ten of said Act be, and is hereby, amended by striking out the word "farrier" wherever it occurs in said section and substituting therefor the words "stable sergeant"; change the period at the end of the second paragraph of said section to a colon and add the following: "And provided further, That any person who at the time of the approval of this Act shall be and has been an officer of the Medical Reserve Corps, or contract surgeon, on active duty for twelve years subsequent to eighteen hundred and ninety-eight shall be eligible for appointment as first lieutenant in the Medical Corps, subject to examination: And provided further, That any officer so eligible who fails to pass the physical examination by reason of disability incurred in line of duty shall be retired with the pay and allowances of a first lieutenant of the Medical Corps.

Sec. 2. That section twenty-two of said Act be, and is hereby, amended by striking out the period at the end thereof, substituting therefor a colon, and adding thereto the following: Provided, That one of the enlisted men at each main recruiting station who has been detached for duty at such station under the provisions of the Act of

Congress approved February second, nineteen hundred and one, may, in the discretion of the Secretary of War, have the rank, pay, and allowances of a first sergeant of Infantry.

Sec. 3. That the second paragraph of section twenty-four of said Act down to the third proviso in said paragraph be, and is hereby, amended to read as follows:

"Vacancies in the grade of second lieutenant, however arising, in any fiscal year shall be filled by appointment in the following order: (1) Of cadets graduated from the United States Military Academy during the preceding fiscal year for whom vacancies did not become available during the fiscal year in which they were graduated; (2) under the provisions of existing law of enlisted men, including officers of Philippine Scouts, between the ages of twenty-one and thirty-four years, whose fitness for promotion shall have been determined by competitive examination; and of members, including officers, of the Organized Militia, the National Guard, or Naval Militia, between the ages of twenty-one and thirty-four years who have had at least ninety days' actual Federal military service during the calendar year nineteen hundred and sixteen, or subsequent thereto, and whose fitness for promotion shall have been determined by examination; (3) of commissioned officers of the National Guard, between the ages of twenty-one and twenty-seven years, not otherwise provided for herein; (4) of members of the Officers' Reserve Corps, between the ages of twenty-one and twenty-seven years; (5) of such honor graduates, between the ages of twenty-one and twenty-seven years, of distinguished colleges as are now or may hereafter be entitled to preference by general orders of the War Department; and (6) of candidates from civil life, between the ages of twenty-one and twenty-seven years; and the President is authorized to make the necessary rules and regulations to carry these provisions into effect: Provided, That the President is hereby authorized to waive the maximum age limit prescribed by law for appointment as second lieutenant in the Regular Army in the case of any candidate for such appointment who has successfully completed or who may hereafter successfully complete the required examination for such appointment before arriving at the prescribed maximum age limit; but no appointment of any such candidate shall be made to any vacancy which did not exist upon the date he successfully completed the required examination for appointment; and persons appointed under the provisions of this proviso shall be appointed with the rank and date of rank with which they would have been appointed if their appointment had not been prevented by reason of the maximum age limit prescribed by law."

Sec. 4. That the last proviso of section twenty-four of said Act be, and is hereby, amended by substituting the word "colonel" for the word "major" therein.

Sec. 5. That section twenty-eight of said Act be, and is hereby, amended by striking out the period at the end thereof, substituting therefor a colon, and adding the following:

"Provided, That enlisted men who are now qualified, or who may hereafter qualify, as expert military telegraphers, shall receive \$5 a

month; as first-class military telegraphers, \$3 a month; as military telegraphers, \$2 a month; all in addition to their pay, under such regulations as the Secretary of War may prescribe, but no enlisted man shall receive at the same time additional pay for more than one of the classifications named."

Sec. 6. That section thirty-one of said Act be, and is hereby, amended by striking out the words "travel expenses and pay at the rate of their respective grades in the Regular Army during such periods of training," occurring in lines nine, ten, and eleven, and substituting therefor the following: "From the date of their departure to place where ordered pay and allowances at the rate of their respective grades in the Regular Army, transportation, and reimbursement of cost of subsistence at such rate as may be fixed by the Secretary of War during travel from home to place where ordered and return to home, and subsistence in kind during period not in transit and while in service."

Sec. 7. That section forty-two of said Act be, and is hereby amended by striking out the period at the end thereof, substituting therefor a colon, and adding the following: "Provided further, That upon the recommendation of the professor of military science and tactics of any such institution, the authorities thereof may discharge a member of the Reserve Officers' Training Corps from such corps and from the necessity of completing the course of military training as a prerequisite to graduation."

Sec. 8. That section fifty-one of said Act be, and is hereby, amended by striking out the words "prior to the date of this Act," in line three thereof, and substituting therefor the words "prior to July first, nineteen hundred and nineteen."

Sec. 9. That the fifth paragraph of section fifty-five of said Act be, and is hereby, amended to read as follows:

"Enlisted men of the Enlisted Reserve Corps shall receive the pay and allowances of their respective grades, but only when ordered into active service and from the date of their departure to place where ordered, transportation and reimbursement of cost of subsistence at such rate as may be fixed by the Secretary of War during travel from home to place where ordered and return home and subsistence in kind during period not in transit and while in service: Provided, That said enlisted men shall not be entitled to retirement or retirement pay: Provided further, That when any enlisted man of the Enlisted Reserve Corps shall be ordered to active service for purposes of instruction or training he may be paid at any time after the date such order shall become effective for the period from the date of leaving home to date of return thereto as determined in advance, both dates inclusive, and such payment, if otherwise correct, shall pass to the credit of the disbursing officer making the same."

Sec. 10. That section one hundred and twenty-five of said Act be, and is hereby, amended by striking out the period at the end thereof, substituting therefor a colon, and adding thereafter the following: "Provided, That hereafter, upon the discharge or furlough to the Reserve of an enlisted man, all uniform outer clothing then in his possession, except such articles as he may be permitted to wear from

the place of termination of his active service to his home, as authorized by this section, will be retained for military use; and within four months after such termination of his active service he shall return all uniform clothing, which he was so permitted to retain for wear to his home, by mail, under a franked label which shall be furnished him for the purpose, and in conformity with the instructions given him at the time of such termination of his active service; and in case he shall fail to return the same within such period, and in accordance with such instructions, he shall be deemed guilty of a misdemeanor, and, upon conviction, suffer the punishment prescribed by this section: Provided further, That upon the release from Federal service of an enlisted man of the National Guard called as such into the service of the United States, all uniform outer clothing then in his possession shall be taken up and accounted for as properly issued to the National Guard of the State to which the enlisted man belongs, in the manner prescribed by section sixty-seven of said Act: And provided further, That when an enlisted man is discharged otherwise than honorably, all uniform outer clothing in his possession shall be retained for military use, and, when authorized by regulations prescribed by the Secretary of War, a suit of citizen's outer clothing to cost not exceeding \$15 may be issued to such enlisted man: And provided further, That officers and members of the National Home for Disabled Volunteer Soldiers may, regardless of the preceding provisions of said Act, wear such uniforms as the Secretary of War may authorize."

CHAPTER XX.

President authorized to enlist men outside of draft age: That during the present war the President be, and he is hereby, authorized to enlist for service in the offices of the War Department or under its control or on detached service under its jurisdiction men outside the draft ages, and for the same purpose to draft men within such ages, who have been disqualified by minor physical defects for active service in the Army; to establish regulations under which such enlistments may be made, and to fix the pay and allowances of men so enlisted or drafted, which said pay and allowances shall not exceed those of enlisted men of the Regular Army.

CHAPTER XXI.

Power of the President to increase the drafted Army: That the authority conferred upon the President by the Act approved May eighteenth, nineteen hundred and seventeen, entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," is hereby extended so as to authorize him during each fiscal year to raise by draft as provided in said Act and Acts amendatory thereof the maximum number of men which may be organized, equipped, trained, and used during such year for the prosecution of the present war until the same shall have been brought to a successful conclusion.

CHAPTER XXIV.

Condemnation of property for generating electric energy: That during the pendency of the present war, any person, association, or corporation, for the purpose of furnishing electric power to the United States or to persons, associations, or corporations engaged in the manufacture of ships, explosives, or munitions of war, or other articles and things for the use of the United States or its allies, upon compliance with the conditions hereinafter set forth, may institute proceedings in any district court of the United States or in any court of any State having jurisdiction of the property to be condemned, for the acquirement by condemnation of any land, the temporary use thereof, or other interest therein, or right pertaining thereto, required for the location or construction of any line or lines for the transmission of electric power for the operation of any plants which are or may be employed in the production of the articles and things hereinbefore mentioned: Provided, That nothing herein shall be construed to authorize the appropriation of any property already devoted to such use. That proceedings for the condemnation of property required for the generation and transmission of such electric power shall be prosecuted in accordance with the procedure prescribed for the condemnation of property in the State wherein the proceedings may be instituted.

Sec. 2. That before any person, association, or corporation, furnishing or to furnish electric power for the purposes mentioned in section one of this Act, shall have the right to institute proceedings for condemnation, they shall submit to the Secretary of War a full and complete statement of the plan for furnishing power and the nature and extent of the easements or property which they desire to acquire under condemnation proceedings, for the purposes stated in the preceding section. If the Secretary of War approve such plan and finds that the construction or extension of such facilities for the generation or transmission of power and that the condemnation herein authorized is necessary to increase the supply of power for the objects and purposes stated in section one of this Act, then such person, association, or corporation shall, upon the approval of such plan by the Secretary of War, have the right to construct, maintain, and operate the facilities described in such plan, and may cause proceedings to be instituted in any court having jurisdiction thereof for the acquirement by condemnation of any lands, the temporary use thereof, or other interest therein, or right pertaining thereto, as may be needed for the construction, maintenance, and operation of such facilities: Provided, That nothing in this section shall be construed as authorizing any rights in any public lands of the United States, or in any waters of the United States except such as may be necessary to build such transmission lines along or across said waters as may be approved by the Secretary of War: Provided further, That the Secretary of War may, prior to granting his approval as above set forth, require such person, association, or corporation to file with him a bond, in an amount and with a surety or sureties satisfactory to him, conditioned upon the prompt construction of the

proposed facilities and the diligent maintenance and operation of the same to the satisfaction of the Secretary of War during the present war.

Sec. 3. That any person, association, or corporation having secured the approval of the Secretary of War and filed a petition for condemnation as herein provided may, upon filing with the court in which such petition is filed a bond to secure payment of just compensation to the owners of property taken, in a form and an amount and with a surety or sureties approved by said court after such notice and such hearing as the court may prescribe, have the right of immediate possession and use of such property or rights.

Sec. 4. That no plan for the construction or extension of any facilities shall be submitted to or approved by the Secretary of War hereunder after the existing state of war between the United States and its enemies shall have terminated, and the fact of such termination shall be ascertained and proclaimed by the President, but such termination of the existing state of war so ascertained and proclaimed shall not interfere with the condemnation of any land or other property or rights needed for the construction, maintenance, and operation of any facilities approved hereunder by the Secretary of War before such proclamation: Provided, however, That the Secretary of War may upon such termination of the existing state of war and prior to the entry of judgment in any condemnation proceeding hereunder and the commencement of construction or extension of the proposed facilities revoke any approval given hereunder to the plan for such proposed facilities: Provided further, That nothing in this chapter shall be construed as granting any franchise to utilize such facilities after the termination of the existing state of war.

That all Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed.

Approved, July 9, 1918.

22. CONTROL OF COMMUNICATIONS ACT

[Public Resolution—No. 38—65th Congress. H. J. Res. 309.]

Joint Resolution to authorize the President, in time of war, to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems or any part thereof and to operate the same in such manner as may be needful or desirable for the duration of the war, and to provide just compensation therefor. [July 16, 1918.]

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend be-

yond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: Provided, That just compensation shall be made for such supervision, possession, control, or operation to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code: Provided further, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems.

Approved, July 16, 1918.

B. REGULATIONS AND GENERAL ORDERS

1. GENERAL ORDERS, No. 7

War Department, Washington, January 17, 1918.

I—Section I, General Orders, No. 169, War Department, 1917, is rescinded and the following rules of procedure prescribed by the President are substituted therefor. This order will be effective from and after February 1, 1918:

1. Whenever, in time of war, the commanding general of a territorial department or a territorial division confirms a sentence of death, or one of dismissal of an officer, he will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with a recital that the execution of the sentence will be directed in orders after the record of trial has been reviewed in the office of the Judge Advocate General, or a branch thereof, and its legality there determined, and that jurisdiction is retained to take any additional or corrective action, prior to or at the time of the publication of the general court-martial order in the case, that may be found necessary. Nothing contained in this rule is intended to apply to any action which a reviewing authority may desire to take under the 51st Article of War.

2. Whenever, in time of peace or war, any officer having authority to review a trial by general court-martial, approves a sentence imposed by such court which includes dishonorable discharge, and such officer does not intend to suspend such dishonorable discharge until the soldier's release from confinement, as provided in the 52d Article of War, the said officer will enter in the record of trial his action thereon, but will not direct the execution of the sentence. His action will conclude with the recital specified in rule 1. This rule will not apply to a commanding general in the field, except as provided in rule 5.

3. When a record of trial in a case covered by rules 1 or 2 is reviewed in the office of the Judge Advocate General, or any branch thereof, and is found to be legally sufficient to sustain the findings and sentence of the court, the reviewing authority will be so informed by letter, if the usual time of mail delivery between the two points does not exceed six days, otherwise, by telegram or cable, and the reviewing authority will then complete the case by publishing his orders thereon and directing the execution of the sentence. If it is found, upon review, that the record is not sufficient to sustain the findings and sentence of the court, the record of trial will be returned to the reviewing authority with a clear statement of the error, omission, or defect which has been found. If such error, omission, or defect admits of correction, the reviewing authority will be advised to reconvene the court for such correction; otherwise he will be advised of the action proper for him to take by way of approval or disapproval of the findings or sentence of the court, remission of the sentence in whole or in part, re-

trial of the case, or such other action as may be appropriate in the premises.

4. Any delay in the execution of any sentence by reason of the procedure prescribed in rules 1, 2, or 3 will be credited upon any term of confinement or imprisonment imposed. The general court-martial order directing the execution of the sentence will recite that the sentence of confinement or imprisonment will commence to run from a specified date, which date, in any given case, will be the date of original action by the reviewing authority.

5. The procedure prescribed in rules 1 and 2 shall apply to any commanding general in the field whenever the Secretary of War shall so decide and shall direct such commanding general to send records of courts-martial involving the class of cases and the character of punishment covered by the said rules, either to the office of the Judge Advocate General at Washington, D. C., or to any branch thereof which the Secretary of War may establish, for final review, before the sentence shall be finally executed.

6. Whenever, in the judgment of the Secretary of War, the expeditious review of trials by general courts-martial occurring in certain commands requires the establishment of a branch of the Judge Advocate General's Office at some convenient point near the said commands, he may establish such branch office and direct the sending of general court-martial records thereto. Such branch office, when so established, shall be wholly detached from the command of any commanding general in the field, or of any territorial, department, or division commander, and shall be responsible for the performance of its duties to the Judge Advocate General.

[250.4, A. G. O.]

II—There is hereby established, in aid of the revisory power conferred on the Judge Advocate General of the Army by section 1199, Revised Statutes, a branch of the office of the Judge Advocate General, at Paris, France, or at some other point convenient to the headquarters of the American Expeditionary Forces in France, to be selected by the officer detailed as the head of such branch office, after conference with the commanding general of the American Expeditionary Forces in France. The officer so detailed shall be the Acting Judge Advocate General of the American Expeditionary Forces in Europe, and shall report to and be controlled in the performance of his duties by the Judge Advocate General of the Army.

The records of all general courts-martial in which is imposed a sentence of death, dismissal, or dishonorable discharge and of all military commissions originating in the said expeditionary forces, will be forwarded to the said branch office for review, and it shall be the duty of the said Acting Judge Advocate General to examine and review such records, to return to the proper commanding officer for correction such as are incomplete, and to report to the proper officer any defect or irregularity which renders the findings or sentence invalid or void, in whole or in part, to the end that any such sentence or any part thereof so found to be invalid or void shall not be carried into effect. The said Acting Judge Advocate General will forward all records in which action is complete, together with his review thereof and

all proceedings thereon to the Judge Advocate General of the Army for permanent file.

[250.4, A. G. O.]

By order of the Secretary of War:

John Biddle, Major General, Acting Chief of Staff.

Official:

H. P. McCain, The Adjutant General.

2. EXECUTIVE ORDER, No. 2877

Whereas, in order to avoid confusion in policies, duplication of effort, and conflicting interpretations of the law, unity of control in the administration of the legal affairs of the Federal Government is obviously essential, and has been so recognized by the acts of Congress creating and regulating the Department of Justice;

Now, therefore, I, Woodrow Wilson, President of the United States, by virtue of the authority vested in me as Chief Executive and by the act "authorizing the President to coordinate or consolidate executive bureaus, agencies and offices, and for other purposes, in the interest of economy and the more efficient concentration of the Government," approved May 20, 1918, do hereby order that all law officers of the Government excepting those in the Philippine Islands, including all law officers attached to any executive bureau, agency or office specially created for the prosecution of the existing war, shall "exercise their functions under the supervision and control of the head of the Department of Justice," in like manner as is now provided by law with respect to the Solicitors for the principal Executive Departments and similar officers; that all litigation in which the United States or any Department, executive bureau, agency or office thereof, are engaged shall be conducted under the supervision and control of the head of the Department of Justice; and that any opinion or ruling by the Attorney General upon any question of law arising in any Department, executive bureau, agency or office shall be treated as binding upon all departments, bureaus, agencies or offices therewith concerned. This order shall not be construed as affecting the jurisdiction exercised under authority of existing law by the Comptroller of the Treasury and the Judge Advocates General of the Army and Navy.

Woodrow Wilson.

The White House, 31 May, 1918.

3. GENERAL ORDERS No. 47

War Department, Washington, May 11, 1918.

V—1. Revised Statutes 3744 to 3747 provide as follows:

"Sec. 3744. It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Of-

fice of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return. (See Secs. 512-515.)

"Sec. 3745. It shall be the further duty of the officer, before making his return, according to the preceding section, to affix to the same his affidavit in the following form, sworn to before some magistrate having authority to administer oaths: 'I do solemnly swear (or affirm) that the copy of contract hereto annexed is an exact copy of a contract made by me personally with ———; that I made the same fairly without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said ———, or any other person; and that the papers accompanying include all those relating to the said contract, as required by the statute in such case made and provided.'

"Sec. 3746. Every officer who makes any contract, and fails or neglects to make return of the same, according to the provisions of the two preceding sections, unless from unavoidable accident or causes not within his control, shall be deemed guilty of a misdemeanor, and shall be fined not less than one hundred dollars nor more than five hundred, and imprisoned not more than six months.

"Sec. 3747. It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to furnish every officer appointed by them with authority to make contracts on behalf of the Government with a printed letter of instructions, setting forth the duties of such officer, under the two preceding sections, and also to furnish therewith forms, printed in blank of contracts to be made, and the affidavit of returns required to be affixed thereto, so that all the instruments may be as nearly uniform as possible."

Extract from Chapter 29, 1st Session, 1917, June 15, 1917 (House Resolution 3971, Statutes 1917, p. 198):

"Sec. 3744, Revised Statutes, is hereby amended by adding the following at the end of the last sentence:

"Provided, That the Secretary of War or Secretary of the Navy may extend the time for filing such contracts in the Returns Office of the Department of the Interior to 90 days whenever in their opinion it would be to the interest of the United States to follow such a course."

2. Numerous failures on the part of contracting officers of the War Department to comply with the provisions of these statutes have been brought to the attention of the department. The chiefs of the several supply bureaus will insure a precise and immediate compliance with these statutes. All contracting officers of the War Department will familiarize themselves with these statutes and comply accurately with their provisions.

[160.14, A. G. O.]

By order of the Secretary of War:

Peyton C. March, Major General, Acting Chief of Staff.

Official:

H. P. McCain, The Adjutant General.

4. GENERAL ORDERS, No. 50

War Department, Washington, May 20, 1918.

IV—Section II, General Orders, No. 68, War Department, 1917, is rescinded, and the following is substituted therefor:

The following act of Congress and the regulations for carrying the same into effect are published to the Army for the information and guidance of all concerned:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section ten of chapter two of an act entitled "An act to codify, revise, and amend the penal laws of the United States," approved March fourth, nineteen hundred and nine, be amended so as to read as follows:

"Sec. 10. Whoever, within the territory or jurisdiction of the United States, enlists or enters himself, or hires or retains another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, State, colony, district, or people as a soldier or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer shall be fined not more than \$1,000 and imprisoned not more than three years: Provided, That this section shall not apply to citizens or subjects of any country engaged in war with a country with which the United States is at war, unless such citizens or subjects of such foreign country shall hire or solicit a citizen of the United States to enlist or go beyond the jurisdiction of the United States with intent to enlist or enter the service of a foreign country. Enlistments under this proviso shall be under regulations prescribed by the Secretary of War.

"Approved May 7, 1917."

1. Within the territory or jurisdiction of the United States the enlistment in the service of any country which is engaged in war with a country with which the United States is at war of persons other than citizens of the United States may be made under the following conditions and under such conditions only:

a. Request for authority to make such enlistments will be made to the Secretary of War by a duly authorized officer or agent of the country concerned, who must also be a citizen or subject of said country, individually accredited by the Government which he represents.

b. Upon approval of request to make enlistments for service in the Army of the Government which he represents, the duly authorized officer or agent accredited, as indicated in subparagraph a hereof, and the assistants appointed or employed by such duly authorized officer or agent may, subject to the conditions imposed by the laws of his own country, and to the exceptions noted below, accept for enlistment and cause to be forwarded to suitable rendezvous within or without the jurisdiction of the United States, any persons, other than citizens of the United States, enlisted or accepted for enlistment for service in the Army of the Government which he represents.

Except in the following cases, no person registered or subject to registration under the selective service act may enlist or be recruited in the military forces of cobelligerents of the United States:

Upon presentation by a registrant to a recruiting officer of a cobelligerent of the United States, of a certificate of final classification of his local board (Form 1007, P. M. G. O.) showing that he has been placed in Class V (e) on the ground that he is an alien enemy, or in Class V (f) on the ground that he is a resident alien who has not declared his intention to become a citizen of the United States, he may enlist in the military forces of a cobelligerent of the United States.

Upon presentation by a registrant to a recruiting officer of a cobelligerent of the United States, of a certificate of his local board that he has been found by the local board not to be a citizen of the United States and not to have declared his intention to become a citizen of the United States; that he has expressly waived classification in Class V on the ground of alienage; and that the local board has placed him in Class II, III, or IV, he may enlist in the military forces of a cobelligerent of the United States. Form 1007, P. M. G. O., may not be used in this case, but the local board shall prepare a special certificate.

Immediately upon the enlistment of a registrant under the exceptions above noted, the recruiting officer shall forward to the local board a certificate that the registrant has enlisted in the military service of the country which the recruiting officer represents. The local board shall, upon receipt of such certificate of the recruiting officer, place in Class V (f) any registrant who has enlisted under the provisions of the subparagraph immediately preceding.

c. The rendezvous within the jurisdiction of the United States, herein referred to, shall in no wise be understood to be military camps, but shall be places of assembly, at which individuals so enlisted shall be free from the military control of those making such enlistments. The number and location of all such rendezvous shall be strictly within the regulatory powers of the Secretary of War and shall be designated as places of assembly only upon the approval of the Secretary of War to whom application for the establishment of such rendezvous shall be made.

d. As far as practicable and convenient the forwarding of those enlisted or accepted for enlistment will be accomplished by the officer or agent duly accredited for the purpose of making such enlistments or by the usual official establishments—embassies, legations, consulates, and the like—maintained in the United States by the country in question.

2. As may be directed by the Secretary of War, the military administrative machinery and officials of the United States, especially the general recruiting service and the depot or other quartermasters of the United States Army, may render such assistance as may be practicable in arranging for the subsistence, lodging, and transportation to a rendezvous selected by the duly accredited officer or agent of the designated country, of those enlisted or applying for enlist-

ment in the service thereof and who may be reported as qualified physically and otherwise for the service desired.

3. Any measures taken by officers or agents of the United States to facilitate this recruiting, as indicated in the preceding paragraph, must be without ultimate expense to the United States.

4. In no case shall anything herein contained be so construed as to justify the enlistment for service in any foreign army of a citizen of the United States.

[336.2, A. G. O.]

By order of the Secretary of War:

Peyton C. March, Major General, Acting Chief of Staff.

Official:

H. P. McCain, The Adjutant General.

5. GENERAL ORDERS, No. 66

[As Amended by Section IV, General Orders, No. 83, War Department, Sept. 10, 1918.]

War Department, Washington, July 12, 1918.

IV—Section XII, General Orders, No. 27, War Department, 1918, is amended to read as follows:

1. The enlisted personnel for the Judge Advocate General's Department, authorized for the period of the existing emergency by the President under authority of the proviso of section 2 of the National Army act approved May 18, 1917, shall consist of such numbers and grades as may from time to time be authorized by the Secretary of War, and their pay and allowances shall be the same as those now prescribed for similarly described grades in the Infantry.

2. Regimental sergeants major and battalion sergeants major, Judge Advocate General's Department, will be appointed by the Judge Advocate General upon the recommendations of the judge advocate under whom they are to serve, approved by the commanding officer of the organizations or commands to which such judge advocates are assigned. Sergeants, corporals, and privates, first class, will be appointed by the commanding officers of the organizations or commands for which they are authorized, upon the recommendation of the judge advocates of such organizations or commands.

Regimental sergeants major and battalion sergeants major, Judge Advocate General's Department, though liable to discharge for inefficiency or for misconduct, will not be reduced except by sentence of a court-martial or by order of the Judge Advocate General based upon a recommendation of the judge advocate under whom they are serving. Sergeants, corporals, and privates, first class, Judge Advocate General's Department, may be reduced by sentence of a court-martial, by order of the Judge Advocate General, based upon the recommendations of the judge advocate under whom they are serving or by the commander of the organization or command, upon the recommendation of the judge advocate of such organization or command.

3. The enlisted personnel of the Judge Advocate General's Department may be appointed from the line of the Army or may be ob-

tained directly by voluntary enlistment or draft, and when appointed will be designated in their grades as noncommissioned officers of the Judge Advocate General's Department, National Army, and will not be transferred to another department or branch of the Army except with the approval of the Judge Advocate General, or when they have been reduced to the grade of private as provided in paragraph 2 hereof, in which case they are subject to transfer as other enlisted men.

4. When a soldier is appointed a noncommissioned officer or private, first class, in the Judge Advocate General's Department, the judge advocate who first received him will prepare and forward a record card of the soldier direct to the Judge Advocate General; except that in the case of a soldier stationed with an organization serving in Europe the card will be sent through the Acting Judge Advocate General for said forces.

5. All records pertaining to the enlisted men of the Judge Advocate General's Department will be kept by the judge advocate under whose immediate direction they are serving, unless the commanding officers of the commands or organizations for which such enlisted men are authorized shall otherwise direct.

6. The Acting Judge Advocate General for the American Expeditionary Forces in Europe is authorized to act for the Judge Advocate General of the Army upon such matters pertaining to the enlisted personnel of the Judge Advocate General's Department serving with the expeditionary forces as the Judge Advocate General may authorize him to act upon.

[242.11, A. G. O.]

By order of the Secretary of War:

Peyton C. March, General, Chief of Staff.

Official:

H. P. McCain, The Adjutant General.

6. BULLETIN No. 35

War Department, Washington, July 3, 1918.

The following is published to the Army for the information and guidance of all concerned:

Under authority of section 12 of the act of Congress "To authorize the President to increase temporarily the Military Establishment of the United States," approved May 18, 1917, which section reads as follows:

Sec. 12. That the President of the United States, as Commander in Chief of the Army, is authorized to make such regulations governing the prohibition of alcoholic liquors in or near military camps and to the officers and enlisted men of the Army as he may from time to time deem necessary or advisable: Provided, That no person, corporation, partnership, or association shall sell, supply, or have in his or its possession, any intoxicating or spirituous liquors at any military station, cantonment, camp, fort, post, officers' or enlisted men's club, which is being used at the time for military purposes

under this act, but the Secretary of War may make regulations permitting the sale and use of intoxicating liquors for medicinal purposes. It shall be unlawful to sell any intoxicating liquor, including beer, ale, or wine, to any officer or member of the military forces while in uniform, except as herein provided. Any person, corporation, partnership, or association violating the provisions of this section or the regulations made thereunder shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than \$1,000 or imprisonment for not more than twelve months, or both—the following regulations are established by the President and the Secretary of War, to continue during the present emergency, and shall supersede all former regulations issued under the aforesaid authority except the regulation of March 2, 1918, relating to the Island of Oahu, Territory of Hawaii:

1. Around every military camp at which officers and enlisted men, not less than two hundred and fifty in number, have been or shall be stationed for more than thirty consecutive days, there shall be for the purposes set forth in this regulation a zone five miles wide, except that within the existing limits of an incorporated city or town, within which the sale of alcoholic liquor shall not be prohibited by the State or local law, the zone shall not include any territory more than one-half mile from the nearest boundary of such camp. Alcoholic liquor, including beer, ale, and wine, either alone or with any other article, shall not, directly or indirectly, be sold, bartered, given, served, or knowingly delivered by one person to another within any such zone, or sent, shipped, transmitted, carried, or transported to any place within any such zone: Provided, That this regulation shall not apply to the giving or serving of such liquor in a private home to members of the family or bona fide guests, other than members of the military forces, or to the sending, shipping, transmitting, carrying, or transporting of such liquor to a private home for use as aforesaid: Provided also, That this regulation shall not apply to the sale or gift of such liquor by registered pharmacists to licensed physicians or medical officers of the United States for medicinal purposes, or to the sending, shipping, transmitting, carrying, or transporting of such liquor to registered pharmacists, licensed physicians, or medical officers of the United States for use as aforesaid.

2. Alcoholic liquor, including beer, ale, and wine, either alone, or with any other article, shall not, directly or indirectly, be sold, bartered, given, served, or knowingly delivered to any officer or member of the military forces, within the United States, their territories or possessions, or any place under their control, except to medical officers for medicinal purposes or when administered by or under the direction of a licensed physician or medical officer.

3. The sale or supply of intoxicating liquors to licensed physicians and medical officers for medicinal purposes, and the possession, use, and administration thereof by such physicians and officers for medicinal purposes, at any military station, cantonment, camp, fort, or post is permitted.

4. All prior violations of former regulations and all penalties incurred thereunder shall be prosecuted and enforced in the same manner and with the same effect as if these superseding regulations had not been established.

Woodrow Wilson.

The White House, June 27, 1918.

Newton D. Baker, Secretary of War.

War Department, June 27, 1918.

[250.11, A. G. O.]

By order of the Secretary of War:

Peyton C. March, General, Chief of Staff.

Official:

H. P. McCain, The Adjutant General.

7. GENERAL ORDERS, No. 73

War Department, Washington, August 7, 1918.

1. This country has but one army—The United States Army. It includes all the land forces in the service of the United States. Those forces, however raised, lose their identity in that of The United States Army. Distinctive appellations, such as the Regular Army, Reserve Corps, National Guard, and National Army, heretofore employed in administration and command, will be discontinued, and the single term, The United States Army, will be exclusively used.

2. Orders having reference to The United States Army as divided into separate and component forces of distinct origin, or assuming or contemplating such a division, are to that extent revoked.

3. The insignia now prescribed for the Regular Army shall hereafter be worn by the United States Army.

4. All effective commissions purporting to be, and described therein as, commissions in the Regular Army, National Guard, National Army, or the Reserve Corps shall hereafter be held to be, and regarded as, commissions in The United States Army—permanent, provisional, or temporary, as fixed by the conditions of their issue; and all such commissions are hereby amended accordingly. Hereafter during the period of the existing emergency all commissions of officers shall be in The United States Army and in staff corps, departments, and arms of the service thereof, and shall, as the law may provide, be permanent, for a term, or for the period of the emergency. And hereafter during the period of the existing emergency provisional and temporary appointments in the grade of second lieutenant and temporary promotions in the Regular Army and appointments in the Reserve Corps will be discontinued.

5. While the number of commissions in each grade and in each staff corps, department, and arm of the service shall be kept within the limits fixed by law, officers shall be assigned without reference to the term of their commissions solely in the interest of the service; and officers and enlisted men will be transferred from one organization to another as the interests of the service may require.

6. Except as otherwise provided by law, promotion in The United

9. GENERAL ORDERS, No. 83

War Department, Washington, September 10, 1918.

II.—1. The Judge Advocate General's Department shall exercise general supervision of all legal and controverted questions arising in the administration of the War Risk Insurance Act within the Army. All such questions arising within the Army in the field shall be presented to, and in the first instance determined by, the officer of that department to be designated for the purpose, and by him submitted, when deemed advisable or necessary, to the Judge Advocate General of the Army. The Judge Advocate General will organize that office and department so that such questions may have the most expeditious consideration and disposition.

2. The Adjutant General's Department is charged with the preparation, execution and disposition of all forms and with all other administrative matters pertaining to the War Risk Insurance Act within the Army, subject to the provisions of paragraph 1 with respect to legal and controverted questions.

(004.61, A. G. O.)

By order of the Secretary of War:

Peyton C. March, General, Chief of Staff.

Official:

P. C. Harris, Acting The Adjutant General.

C. FEDERAL JUDICIAL OPINIONS (1917, 1918)

1. ARVER v. UNITED STATES.

(Supreme Court of the United States, 1918. 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. —, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856.)

In Error to the District Court of the United States for the District of Minnesota.

In Error to the District Court of the United States for the Southern District of New York.

Joseph F. Arver, Alfred F. Grahl, Otto Wangerin, Walter Wangerin, Louis Kramer, and Meyer Graubard were convicted of failing to present themselves for registration under the Act of May 18, 1917, c. 15, and they bring error. Affirmed.

Mr. Chief Justice WHITE delivered the opinion of the Court.

We are here concerned with some of the provisions of the Act of May 18, 1917 (Public No. 12, 65th Congress, c. 15, 40 Stat. 76), entitled "An act to authorize the President to increase temporarily the military establishment of the United States." The law, as its opening sentence declares, was intended to supply temporarily the increased military force which was required by the existing emergency, the war then and now flagrant. The clauses we must pass upon and those which will throw light on their significance are briefly summarized.

The act proposed to raise a national army, first, by increasing the regular force to its maximum strength and there maintaining it; second, by incorporating into such army the members of the National Guard and National Guard Reserve already in the service of the United States (Act of Congress of June 5, 1916, c. 134, 39 Stat. 211) and maintaining their organizations to their full strength; third, by giving the President power in his discretion to organize by volunteer enlistment four divisions of infantry; fourth, by subjecting all male citizens between the ages of twenty-one and thirty to duty in the national army for the period of the existing emergency after the proclamation of the President announcing the necessity for their service; and fifth, by providing for selecting from the body so called, on the further proclamation of the President, 500,000 enlisted men, and a second body of the same number should the President in his discretion deem it necessary. To carry out its purposes the act made it the duty of those liable to the call to present themselves for registration on the proclamation of the President so as to subject themselves to the terms of the act and provided full federal means for carrying out the selective draft. It gave the President in his discretion power to create local boards to consider claims for exemption for physical disability or otherwise made by those called. The act exempted from subjection to the draft designated United States and state officials as well as those already in the military or naval service of the United States, regular or duly ordained ministers of religion and theological students under the conditions provided for, and while relieving from military service in the strict sense the mem-

questioned and that practical effect was given to the power in many cases. Indeed the brief of the government contains a list of Colonial Acts manifesting the power and its enforcement in more than two hundred cases. And this exact situation existed also after the separation. Under the Articles of Confederation it is true Congress had no such power, as its authority was absolutely limited to making calls upon the states for the military forces needed to create and maintain the army, each state being bound for its quota as called. But it is indisputable that the states in response to the calls made upon them met the situation when they deemed it necessary by directing enforced military service on the part of the citizens. In fact the duty of the citizen to render military service and the power to compel him against his consent to do so was expressly sanctioned by the Constitutions of at least nine of the states, an illustration being afforded by the following provision of the Pennsylvania Constitution of 1776:

"That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute his proportion toward the expense of that protection, and yield his personal service when necessary, or an equivalent thereto." Article 8 (Thorpe, *American Charters, Constitutions and Organic Laws*, vol. 5, pp. 3081, 3083).³

While it is true that the states were sometimes slow in exerting the power in order to fill their quotas—a condition shown by resolutions of Congress calling upon them to comply by exerting their compulsory power to draft and by earnest requests by Washington to Congress that a demand be made upon the states to resort to drafts to fill their quotas⁴—that fact serves to demonstrate instead of to challenge the existence of the authority. A default in exercising a duty may not be resorted to as a reason for denying its existence.

When the Constitution came to be formed it may not be disputed that one of the recognized necessities for its adoption was the want of power in Congress to raise an army and the dependence upon the states for their quotas. In supplying the power it was manifestly intended to give it all and leave none to the states, since besides the delegation to Congress of authority to raise armies the Constitution prohibited the states, without the consent of Congress, from keeping troops in time of peace or engaging in war. Article 1, § 10.

To argue that as the state authority over the militia prior to the Constitution embraced every citizen, the right of Congress to raise an army should not be considered as granting authority to compel the citizen's service in the army, is but to express in a different form the denial of the right to call any citizen to the army. Nor is this met by saying that it does not exclude the right of Congress to organize an

³ See also Constitution of Vermont, 1777, c. 1, art. 9 (Thorpe, vol. 6, pp. 3737, 3740); New York, 1777, art. 40 (Id. vol. 5, p. 2637); Massachusetts Bill of Rights, 1780, art. 10 (Id. vol. 3, p. 1891); New Hampshire, 1784, pt. 1, Bill of Rights, art. 12 (Id. vol. 4, p. 2455); Delaware, 1776, art. 9 (Id. vol. 1, pp. 563, 564); Maryland, 1776, art. 33 (Id. vol. 3, pp. 1686, 1696); Virginia, 1776, Militia (Id. vol. 7, p. 3817); Georgia, 1777, arts. 33, 35 (Id. vol. 2, pp. 777, 782).

⁴ Journals of Congress, Ford's Ed., Library of Congress, vol. 7, pp. 262, 263; vol. 10, pp. 199, 200; vol. 13, p. 299. 7 Sparks, *Writings of Washington*, pp. 162, 167, 442, 444.

army by voluntary enlistments, that is, by the consent of the citizens, for if the proposition be true, the right of the citizen to give consent would be controlled by the same prohibition which would deprive Congress of the right to compel unless it can be said that although Congress had not the right to call because of state authority, the citizen had a right to obey the call and set aside state authority if he pleased to do so. And a like conclusion demonstrates the want of foundation for the contention that although it be within the power to call the citizen into the army without his consent, the army into which he enters after the call is to be limited in some respects to services for which the militia it is assumed may only be used, since this admits the appropriateness of the call to military service in the army and the power to make it and yet destroys the purpose for which the call is authorized—the raising of armies to be under the control of the United States.

The fallacy of the argument results from confounding the constitutional provisions concerning the militia with that conferring upon Congress the power to raise armies. It treats them as one while they are different. This is the militia clause:

“The Congress shall have power: * * * To provide for calling forth the militia to execute the laws of the nation, suppress insurrections and repel invasions; to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.” Article 1, § 8.

The line which separates it from the army power is not only inherently plainly marked by the text of the two clauses, but will stand out in bolder relief by considering the condition before the Constitution was adopted and the remedy which it provided for the military situation with which it dealt. The right on the one hand of Congress under the Confederation to call on the states for forces and the duty on the other of the states to furnish when called, embraced the complete power of government over the subject. When the two were combined and were delegated to Congress all governmental power on that subject was conferred, a result manifested not only by the grant made but by the limitation expressly put upon the states on the subject. The army sphere therefore embraces such complete authority. But the duty of exerting the power thus conferred in all its plenitude was not made at once obligatory but was wisely left to depend upon the discretion of Congress as to the arising of the exigencies which would call it in part or in whole into play. There was left therefore under the sway of the states undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies. This did not diminish the military power or curb the full potentiality of the right to exert it but left an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared. This, therefore, is what was dealt with by the militia provision. It diminished the occasion for the exertion by Congress of its military power beyond the strict necessities

for its exercise by giving the power to Congress to direct the organization and training of the militia (evidently to prepare such militia in the event of the exercise of the army power) although leaving the carrying out of such command to the states. It further conducted to the same result by delegating to Congress the right to call on occasions which were specified for the militia force, thus again obviating the necessity for exercising the army power to the extent of being ready for every conceivable contingency. This purpose is made manifest by the provision preserving the organization of the militia so far as formed when called for such special purposes although subjecting the militia when so called to the paramount authority of the United States. *Tarble's Case*, 13 Wall. 397, 408, 20 L. Ed. 597. But because under the express regulations the power was given to call for specified purposes without exerting the army power, it cannot follow that the latter power when exerted was not complete to the extent of its exertion and dominant. Because the power of Congress to raise armies was not required to be exerted to its full limit but only as in the discretion of Congress it was deemed the public interest required, furnishes no ground for supposing that the complete power was lost by its partial exertion. Because, moreover, the power granted to Congress to raise armies in its potentiality was susceptible of narrowing the area over which the militia clause operated, affords no ground for confounding the two areas which were distinct and separate to the end of confusing both the powers and thus weakening or destroying both.

And upon this understanding of the two powers the legislative and executive authority has been exerted from the beginning. From the act of the first session of Congress carrying over the army of the government under the Confederation to the United States under the Constitution (Act of September 29, 1789, c. 25, 1 Stat. 95) down to 1812 the authority to raise armies was regularly exerted as a distinct and substantive power, the force being raised and recruited by enlistment. Except for one act formulating a plan by which the entire body of citizens (the militia) subject to military duty was to be organized in every state (Act of May 8, 1792, c. 33, 1 Stat. 271) which was never carried into effect, Congress confined itself to providing for the organization of a specified number distributed among the states according to their quota to be trained as directed by Congress and to be called by the President as need might require.⁵ When the War of 1812 came the result of these two forces composed the army to be relied upon by Congress to carry on the war. Either because it proved to be weak in numbers or because of insubordination developed among the forces called and manifested by their refusal to cross the border,⁶ the government determined that the exercise of the power to organize an army by compulsory draft was necessary and Mr. Monroe, the Secretary of War (Mr. Madison being President), in a letter to Congress recommended several plans of legislation on that subject. It suffices to

⁵ Act of May 9, 1794, c. 27, 1 Stat. 367; Act of February 28, 1795, c. 38, 1 Stat. 424; Act of June 24, 1797, c. 4, 1 Stat. 522; Act of March 3, 1803, c. 32, 2 Stat. 241; Act of April 18, 1806, c. 32, 2 Stat. 383; Act of March 30, 1806, c. 39, 2 Stat. 478; Act of April 10, 1812, c. 55, 2 Stat. 705.

⁶ Upton, *Military Policy of the United States*, p. 99 et seq.

say that by each of them it was proposed that the United States deal directly with the body of citizens subject to military duty and call a designated number out of the population between the ages of 18 and 45 for service in the army. The power which it was recommended be exerted was clearly an unmixed federal power dealing with the subject from the sphere of the authority given to Congress to raise armies and not from the sphere of the right to deal with the militia as such, whether organized or unorganized. A bill was introduced giving effect to the plan. Opposition developed, but we need not stop to consider it because it substantially rested upon the incompatibility of compulsory military service with free government, a subject which from what we have said has been disposed of. Peace came before the bill was enacted.

Down to the Mexican War the legislation exactly portrayed the same condition of mind which we have previously stated. In that war, however, no draft was suggested, because the army created by the United States immediately resulting from the exercise by Congress of its power to raise armies, that organized under its direction from the militia and the volunteer commands which were furnished, proved adequate to carry the war to a successful conclusion.

So the course of legislation from that date to 1861 affords no ground for any other than the same conception of legislative power which we have already stated. In that year when the mutterings of the dread conflict which was to come began to be heard and the proclamation of the President calling a force into existence was issued it was addressed to the body organized out of the militia and trained by the states in accordance with the previous acts of Congress. Proclamation of April 15, 1861, 12 Stat. 1258. That force being inadequate to meet the situation, an act was passed authorizing the acceptance of 500,000 volunteers by the President to be by him organized into a national army. Act of July 22, 1861, c. 9, 12 Stat. 268. This was soon followed by another act increasing the force of the militia to be organized by the states for the purpose of being drawn upon when trained under the direction of Congress (Act of July 29, 1861, c. 25, 12 Stat. 281), the two acts when considered together presenting in the clearest possible form the distinction between the power of Congress to raise armies and its authority under the militia clause. But it soon became manifest that more men were required. As a result the Act of March 3, 1863 (c. 75, 12 Stat. 731), was adopted entitled "An act for enrolling and calling out the national forces and for other purposes." By that act which was clearly intended to directly exert upon all the citizens of the United States the national power which it had been proposed to exert in 1814 on the recommendation of the then Secretary of War, Mr. Monroe, every male citizen of the United States between the ages of 20 and 45 was made subject by the direct action of Congress to be called by compulsory draft to service in a national army at such time and in such numbers as the President in his discretion might find necessary. In that act, as in the one of 1814, and in this one, the means by which the act was to be enforced were directly federal and the force to be raised as a result of the draft was therefore typically national as distinct from the call into active service of the militia as such. And under the power thus exerted four separate calls for draft were made by the President

and enforced, that of July, 1863, of February and March, 1864, of July and December, 1864, producing a force of about a quarter of a million men.⁷ It is undoubted that the men thus raised by draft were treated as subject to direct national authority and were used either in filling the gaps occasioned by the vicissitudes of war in the ranks of the existing national forces or for the purpose of organizing such new units as were deemed to be required. It would be childish to deny the value of the added strength which was thus afforded. Indeed in the official report of the Provost Marshal General, just previously referred to in the margin, reviewing the whole subject it was stated that it was the efficient aid resulting from the forces created by the draft at a very critical moment of the civil strife which obviated a disaster which seemed impending and carried that struggle to a complete and successful conclusion.

Brevity prevents doing more than to call attention to the fact that the organized body of militia within the states as trained by the states under the direction of Congress became known as the National Guard. Act of January 21, 1903, c. 196, 32 Stat. 775; National Defense Act of June 5, 1916, c. 134, 39 Stat. 211. And to make further preparation from among the great body of the citizens, an additional number to be determined by the President was directed to be organized and trained by the states as the National Guard Reserve. National Defense Act, *supra*.

Thus sanctioned as is the act before us by the text of the Constitution, and by its significance as read in the light of the fundamental principles with which the subject is concerned, by the power recognized and carried into effect in many civilized countries, by the authority and practice of the colonies before the Revolution, of the states under the Confederation and of the government since the formation of the Constitution, the want of merit in the contentions that the act in the particulars which we have been previously called upon to consider was beyond the constitutional power of Congress, is manifest. Cogency, however, if possible, is added to the demonstration by pointing out that in the only case to which we have been referred where the constitutionality of the act of 1863 was contemporaneously challenged on grounds akin to, if not absolutely identical with, those here urged, the validity of the act was maintained for reasons not different from those which control our judgment. *Kneedler v. Lane*, 45 Pa. 238. And as further evidence that the conclusion we reach is but the inevitable consequence of the provisions of the Constitution as effect follows cause, we briefly recur to events in another environment. The seceding states wrote into the Constitution which was adopted to regulate the government which they sought to establish, in identical words the provisions of the Constitution of the United States which we here have under consideration. And when the right to enforce under that instrument a selective draft law which was enacted not differing in principle from the one here in question was challenged, its validity was upheld evidently after great consideration by the courts of Virginia, of Georgia, of Texas, of Alabama, of Mississippi and of North Carolina, the opin-

⁷ Historical Report, Enrollment Branch, Provost Marshal General's Bureau, March 17, 1866.

ions in some of the cases copiously and critically reviewing the whole grounds which we have stated. *Burroughs v. Peyton*, 16 Grat. (Va.) 470; *Jeffers v. Fair*, 33 Ga. 347; *Daly and Fitzgerald v. Harris*, 33 Ga. Supp. 38, 54; *Barber v. Irwin*, 34 Ga. 27; *Parker v. Kaughman*, 34 Ga. 136; *Ex parte Coupland*, 26 Tex. 386; *Ex parte Hill*, 38 Ala. 429; *In re Emerson*, 39 Ala. 437; *In re Pille*, 39 Ala. 459; *Simmons v. Miller*, 40 Miss. 19; *Gatlin v. Walton*, 60 N. C. 333, 408.

In reviewing the subject we have hitherto considered it as it has been argued from the point of view of the Constitution as it stood prior to the adoption of the Fourteenth Amendment. But to avoid all misapprehension we briefly direct attention to that amendment for the purpose of pointing out, as has been frequently done in the past,⁸ how completely it broadened the national scope of the government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and therefore operating as it does upon all the powers conferred by the Constitution leaves no possible support for the contentions made if their want of merit was otherwise not so clearly made manifest.

It remains only to consider contentions which, while not disputing power, challenge the act because of the repugnancy to the Constitution supposed to result from some of its provisions. First, we are of opinion that the contention that the act is void as a delegation of federal power to state officials because of some of its administrative features is too wanting in merit to require further notice. Second, we think that the contention that the statute is void because vesting administrative officers with legislative discretion has been so completely adversely settled as to require reference only to some of the decided cases. *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; *Intermountain Rate Cases*, 234 U. S. 476, 34 Sup. Ct. 986, 58 L. Ed. 1408; *First National Bank v. Union Trust Co.*, 244 U. S. 416, 37 Sup. Ct. 734, 61 L. Ed. 1233, L. R. A. 1918C, 283. A like conclusion also adversely disposes of a similar claim concerning the conferring of judicial power. *Buttfield v. Stranahan*, 192 U. S. 470, 497, 24 Sup. Ct. 349, 48 L. Ed. 525; *West v. Hitchcock*, 205 U. S. 80, 27 Sup. Ct. 423, 51 L. Ed. 718; *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 338-340, 29 Sup. Ct. 671, 53 L. Ed. 1013; *Zakonaite v. Wolf*, 226 U. S. 272, 275, 33 Sup. Ct. 31, 57 L. Ed. 218. And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred because we think its unsoundness is too apparent to require us to do more.

Finally, as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor

⁸ *Slaughter House Cases*, 16 Wall. 36, 72-74, 94, 95, 112, 113, 21 L. Ed. 394; *United States v. Cruikshank*, 92 U. S. 542, 549, 23 L. Ed. 588; *Royd v. Thayer*, 143 U. S. 135, 140, 12 Sup. Ct. 375, 36 L. Ed. 103; *McPherson v. Blacker*, 146 U. S. 1, 37, 13 Sup. Ct. 3, 36 L. Ed. 869.

of the nation as the result of a war declared by the great representative body of the people can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement.

Affirmed.

2. GOLDMAN v. UNITED STATES.

(Supreme Court of the United States. 1918. 245 U. S. 474, 38 Sup. Ct. 166, 62 L. Ed. —.)

In Error to the District Court of the United States for the Southern District of New York.

Emma Goldman and Alexander Berkman were convicted of an offense and they bring error. Affirmed.

Mr. Chief Justice WHITE delivered the opinion of the Court.

Because of the constitutional questions involved the plaintiffs in error prosecute this direct writ of error to reverse a criminal conviction and resulting sentence imposed upon them. The indictment upon which the conviction was had charged them with having, in violation of sections 37 and 332 of the Criminal Code (Comp. St. 1916, §§ 10201, 10506), unlawfully conspired together and with others unknown to induce persons who by the Selective Draft Law of May 18, 1917, (Public No. 12, 65th Congress, c. 15, — Stat. —) were under the duty to register, to disobey the law by failing to register. Five specified overt acts were in the indictment charged to have been committed in furtherance of the alleged illegal conspiracy.

Seven grounds of error were assigned at the time of the allowance of the writ: (1) The refusal of the court at the request of the defendants to dismiss the indictment on the ground that the formation of a conspiracy to induce persons not to register as they were required under the law to do and the performance of overt acts to carry out the conspiracy constituted no offense. (2) The action of the court in refusing to grant a motion in arrest of judgment on the same ground. (3) The refusal to set aside the verdict because the facts proved did not constitute an offense against the United States. (4) The denial of a motion to dismiss the prosecution at the request of the defendants on the ground that the Selective Draft Law upon which the alleged duty to register depended was repugnant to the Constitution and void, there being numerous specifications on this subject involving a challenge of all power in Congress to have enacted the law and moreover upon the assumption of some power an assertion of the repugnancy of the statute to the Constitution resulting from various provisions which the act contained. (5) The denial by the court of a motion made at the close of the case to dismiss the indictment on the ground that it stated no offense as previously insisted and upon the further ground that in any event there was no proof of the alleged conspiracy or the averred overt acts or of any act adequate to show guilt. (6 and 7) The refusal of a motion to set aside the verdict and in arrest of judgment because the verdict was contrary to law and un-

supported by evidence upon grounds which had been previously urged and overruled.

Putting aside the multiplication which results from urging the same ground several times because when once made it was adhered to and reiterated at different stages of the trial, it is clear that the assignments embrace only three propositions: (1) The failure to dismiss the prosecution because of the repugnancy of the Selective Draft Law to the Constitution for the reasons relied upon. (2) The refusal to dismiss because the indictment stated no offense. (3) The refusal to dismiss because there was no proof of conspiracy or of any overt acts adequate to have justified the submission of the case to the jury. Indeed in the elaborate argument at bar all the assignments of error are treated as embraced under the propositions thus stated and we therefore come to dispose of the case from such point of view.

1. The grounds here made the basis of the charge that the Selective Draft Law is repugnant to the Constitution are so far as they concern the question of registration provided for by that law, identical with those which were urged in *Arver v. United States*, 245 U. S. 366, 38 Sup. Ct. 159, 62 L. Ed. —, L. R. A. 1918C, 361, Ann. Cas. 1918D, 856, and were there adversely disposed of. The ruling in that case therefore also adversely disposes of all the relevant constitutional questions in this. The duty nevertheless remains to consider the other questions. *Brolan v. United States*, 236 U. S. 216–218, 35 Sup. Ct. 285, 59 L. Ed. 544.

2. The contention that the indictment stated no offense proceeds upon the assumption reiterated in various forms of statement that no crime results from an unlawful conspiracy to bring about an illegal act joined with the doing of overt acts in furtherance of the conspiracy unless the conspiracy has accomplished its unlawful purpose by causing the illegal act to be committed. This, however, but disregards the settled doctrine that an unlawful conspiracy under section 37 of the Criminal Code to bring about an illegal act and the doing of overt acts in furtherance of such conspiracy is in and of itself inherently and substantively a crime punishable as such irrespective of whether the result of the conspiracy has been to accomplish its illegal end. *United States v. Rabinowich*, 238 U. S. 78, 85, 86, 35 Sup. Ct. 682, 59 L. Ed. 1211, and authorities there cited.

3. Sifting out of the arguments advanced to support the proposition that there was no evidence whatever tending to show guilt, contentions based upon the misconception as to the law of conspiracy which we have just adversely disposed of, and, moreover, contentions concerning an asserted misuse of discretion by the court below in ruling on an application to postpone the trial, which as we have seen, were not even remotely referred to in the assignments of error, we think all the arguments rest upon the assumption that the power to review embraces the right to invade the province of the jury by determining questions of credibility and weight of evidence and from the residuum of evidence resulting from indulging in and applying the results of such erroneous assumption drawing the conclusion as to no evidence relied upon. While this statement suffices to dispose of the case without going further, we nevertheless say without recapitulating the evi-

dence that after a review of the whole record we think the proposition that there was no evidence whatever of guilt to go to the jury is absolutely devoid of merit.

It follows that the judgment below must be and it is Affirmed.

3. In re LARRUCEA.

(District Court of the United States, Southern District of California, Southern Division, 1917. 249 Fed. 981.)

BLEDSON, District Judge. Pursuant to petitions filed, an order to show cause why writs of habeas corpus should not issue was entered.

Upon the hearing it developed that the above-named petitioner, with three of his countrymen, are citizens of the Kingdom of Spain; for some years they have been domiciled within the United States, and each of them has heretofore filed his declaration of intention to become a citizen of the United States under the naturalization laws thereof; they were arrested off the shore of Mexico by a United States war vessel and are now detained under appropriate process by the marshal of the district as for evading the conscription act hereinafter referred to.

Petitioners claim that when taken into custody they were proceeding on their way to Spain. There is no issue as to the facts, and the single question presented is whether or not the petitioners are subject to the provisions of the conscription law. Their claim in that behalf is that owing to a treaty between Spain and the United States they are exempt from all forms of compulsory military service in the United States, and under the undoubted law of nations had the right, in spite of the conscription law, to leave the United States and return to the land of their nativity. Moore, *International Law Digest*, vol. 4, p. 52.

The existing treaty between Spain and the United States, proclaimed April 20, 1903, provides in article 5 (33 Stat. 2108): "The citizens or subjects of each of the high contracting parties shall be exempt in the territories of the other from all compulsory military service by land or sea and from all pecuniary contributions in lieu of such, as well as from all obligatory official functions whatsoever." Malloy's *Treaties and Conventions*, vol. 2, p. 1701.

The claims of petitioners are resisted by the Government of the United States on the ground that the conscription law provides in express terms for their subjection to compulsory military service, and that being later in date than the treaty with Spain it controls, and that in consequence they should be remanded for trial. With this contention, upon a careful reading of the law, I am constrained to concur.

Article 6 of the Federal Constitution provides that "this Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made or which shall be made under authority of the United States shall be the supreme law of the land." It has long been the rule of decision in the United States, however, that

in so far as the judicial department of the Government is concerned a treaty occupies no position of superiority over an act of Congress. They are on a parity in so far as the provisions of the Constitution are concerned, and, like other expressions of the legislative will, when inconsistent or irreconcilable, the latest in point of time must control. *Cherokee Tobacco Cases*, 11 Wall. 616, 621, 20 L. Ed. 227; *Head Money Cases*, 112 U. S. 580, 598, 5 Sup. Ct. 247, 28 L. Ed. 798. In the event, then, of a conflict between an earlier treaty and a later act of Congress the courts are bound to accord to the act of Congress compelling authority and remit one who claims rights or privileges under the treaty which are denied to him by the act of Congress to the political department of the Government. *Tobacco Cases*, *supra*. In other words, in such an exigency, if the country with whom the treaty has been ratified is dissatisfied with the action of the legislative department of our Government, it may present its complaint to the executive head thereof and take such other measures as it may deem necessary for the protection of its interests. The courts thereof, however, which are bound to act in conformity with the constitutional mandates of Congress, can afford no redress. *Whitney v. Robertson*, 124 U. S. 194, 8 Sup. Ct. 456, 31 L. Ed. 386.

The conscription or selective draft law, being the act "to authorize the President to increase temporarily the Military Establishment of the United States," approved May 18, 1917 (40 Stat. 76, c. 15), "in view of the existing emergency, which demands the raising of troops in addition to those now available," and authorizing the organizing and equipping of more than a million men under arms by selective draft, provided in section 2 thereof that "such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of 21 and 30 years, both inclusive." In section 4 certain Federal, State, and other officers, ministers of religion, theological students, and members of the military and naval service of the United States are declared exempt, and it is also stated that nothing in the act contained shall be construed to require or compel the service of any member of a well-recognized religious sect whose religious convictions are against war, etc. Provision is also made for partial exemption of other named classes.

Section 5 provided that "all male persons between the ages of 21 and 30, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men in the Regular Army, the Navy, and the National Guard and Naval Militia, while in the service of the United States, to present themselves for and to submit to registration under the provisions of this act. * * * Provided further, That persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday, and who shall not have attained their thirty-first birthday on or before the day set for the registration, *and all persons so registered shall be and remain subject to draft into the forces*

hereby authorized unless exempt or excused therefrom as in this act provided." (Italics supplied.)

Section 14, the concluding section of the act, is to the effect that "all laws and parts of laws in conflict with the provisions of this act are hereby suspended during the period of this emergency."

No provision is made anywhere in the act for positive exemptions from service other than those referred to; and no mention at all is made of any exemption because of treaties with any foreign nation. The language of the act requiring all male persons between the stated ages to register and providing that all persons so registered shall be and remain subject to draft, "unless exempted or excused therefrom as in this act provided," makes it impossible for me to conclude that it was intended by the act to exempt citizens of Spain or of other countries possessing similar treaty rights.

The particular claim is made by the petitioners that the language of section 2 to the effect that the draft "shall be based upon liability to military service" is conclusive of an intent upon the part of the congress in the passage of this act to exclude from the operation of the act those who were not liable to military service because of some treaty provision. It is perhaps difficult to appreciate just exactly what Congress had in mind in the use of the phrase "liability to military service," there being no general law to which my attention has been called definitely establishing and fixing "liability to military service" under the laws of the United States. It has been the attitude of our State Department from the time of Mr. Madison, when he was Secretary thereof, that resident aliens not naturalized are not liable to perform military service. Moore, *International Law Digest*, vol. 4, pp. 51 to 65. Of course, the execution of a mere "declaration of intention" does not constitute naturalization. Moore's *Digest*, vol. 111, p. 336.

The Congress in the draft law of 1863, however, enacted "that all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared their intention to become citizens under and pursuant to the laws thereof, between the ages of 20 and 45 years, except as hereinafter excepted, are hereby declared to constitute the national forces and shall be liable to perform military duty in the United States when ordered out by the President for that purpose." By the act of April 22, 1898 (30 Stat. 361, Comp. St. 1916, § 1714), it was provided "that all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared their intention to become citizens of the United States under and in pursuance of the laws thereof, between the ages of 18 and 45 years, are hereby declared to constitute the national forces, and, with such exceptions and under such conditions as may be prescribed by law, shall be liable to perform military duty in the service of the United States." By the terms of the act passed January 21, 1903, which was subsequent to the negotiation of the treaty with Spain, though prior to its ratification or promulgation, it was provided that the militia should consist of "every able-bodied male citizen" and every "able-bodied male of foreign birth who has declared his intention to become a citizen" between the ages of 18 and 45. 32 Stat. 775.

It may have been that the phrase "liability to military service" was borrowed from the previous acts. It would seem as if the present draft act were in completest harmony with other military service statutes in that behalf. Be that as it may, however, the act does provide in express terms that the draft shall be based upon liability to military service of all male citizens and of all male persons not alien enemies who have declared their intention to become citizens, and, as above recited, contains the further provision that of all persons registered none shall be exempt from service unless exempt or excused "as in the act provided." The language seems indicative of such a "positive repugnancy" (*Chew Heong v. United States*, 112 U. S. 536, 549, 5 Sup. Ct. 255, 28 L. Ed. 770) to the terms of the treaty with Spain as to leave no room for the conclusion that they can be read together, and that Congress was intending that citizens of Spain as well as of other countries who had declared their intention of becoming citizens of the United States under the naturalization laws should be subject to the demands of the emergency.

The conclusion here announced is confirmed in a degree by the concluding section of the act suspending all laws in conflict with it during the period of emergency.

It follows that the court, conceiving it to be its duty to follow the intent of Congress, must needs remand the petitioners to such relief as may be accorded to them by the political department of the Government. The order to show cause is discharged and the writs petitioned for are denied.

4. MASSES PUB. CO. v. PATTEN.

(Circuit Court of Appeals of the United States, Second Circuit, 1917. 246 Fed. 24, 118 C. C. A. 250, 14 R. A. 1918C, 79, Ann. Cas. 1918B, 999.)

Before WARD and ROGERS, Circuit Judges, and MAYER, District Judge.

This cause comes here on appeal from an interlocutory order of the United States District Court for the Southern District of New York granting a temporary injunction commanding the defendant to transmit a certain publication through the mails, which order was entered on July 26, 1917. 245 Fed. 102, 157 C. C. A. 398.

Thereafter and on August 4, 1917, the aforesaid order was stayed until the hearing and determination of the appeal taken by the defendant.

ROGERS, Circuit Judge. The complainant seeks an injunction restraining the defendant as postmaster of the city of New York from treating the August issue of a magazine known as "The Masses" as nonmailable matter under the act of Congress of June 15, 1917, commonly known as the "Espionage Act," and commanding him to transmit the said magazine through the mail in the usual way.

Upon the filing of the complaint an order was entered requiring the defendant to show cause why the injunction should not issue.

At the hearing affidavits were presented on behalf of the complain-

ant to show that if the magazines should be excluded from the mails the business of the complainant would be practically ruined.

An affidavit of the Postmaster General of the United States was presented on behalf of the defendant.

Under the provisions of Espionage Act (Act June 15, 1917, c. 30, 40 Stat. 217) title 12, it became the official duty of the Postmaster General to determine what matter is nonmailable, and that official had instructed the postmaster at New York that "The Masses" was nonmailable. It appears that before this order was issued the solicitor for the department, the Attorney General of the United States, and the Judge Advocate General of the Army, the latter being a lawyer and charged with the administration of the Draft Act, were consulted, and that they each advised that the circulation of the issue in question would constitute an offense under the Espionage Act. And the Judge Advocate General informed the department that it was his opinion that the necessary effect of the issue of this August number would be to cause insubordination, disloyalty, mutiny, and refusal of duty in the naval and military forces of the United States, and that it would obstruct the recruiting and enlistment service of the United States.

The learned district judge, in a carefully prepared opinion, reached the conclusion that the August issue of the publication in question did not contain any illegal matter, and that the injunction should issue.

That part of the Espionage Act which is involved here is title 12, which relates to the use of mails, and it reads as follows:

"Section 1. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book or other publication, matter or thing of any kind in violation of any of the provisions of this act is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier: Provided, That nothing in this act shall be so construed as to authorize any person other than an employee of the Dead Letter Office, duly authorized thereto, or other person upon a search warrant authorized by law, to open any letter not addressed to himself.

"Sec. 2. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing of any kind containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, is hereby declared to be nonmailable."

Section 3 of title 12 relates to the punishment to be imposed upon any person who uses, or attempts to use, the mails for the transmission of any matter declared to be nonmailable, and is not involved in this proceeding. But as section 1 of title 12 makes nonmailable any matter which is in violation of any of the provisions of the act, it will be necessary to consider section 3 of title 1, which reads as follows:

"Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and whoever, when the United States is at war, shall willfully cause, or attempt to cause, insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States, or shall willfully

obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than 20 years, or both."

It is the clear intent of title 12 to close the United States mails to any letters or literature in furtherance of any acts prohibited under the other titles of the statute.

It is said that the act violates the first amendment to the Constitution, which declares that "Congress shall make no law * * * abridging the freedom of speech or of the press."

It is also said that the act violates the fifth amendment, which provides that "No person shall be * * * deprived of life, liberty, or property without due process of law."

In his Commentaries on the Laws of England, Mr. Justice Blackstone, in speaking of the liberty of the press, declares that it is "essential to the nature of a free State." It consists, he says, "in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity." Vol. 4, p. 151. And Mr. Justice Story, in his Commentaries on the Constitution, states that "Every free man has undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press." Vol. 2, § 1884, 4th ed.

In *Patterson v. Colorado*, 205 U. S. 454, 462, 27 Sup. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689 (1907), the court, speaking through Mr. Justice Holmes, declares that the main purpose of the constitutional provision as to the press is "to prevent all such previous restraints upon publications as had been practiced by other Governments, and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." Now, clearly the Espionage Act imposes no restraint prior to publication, and no restraint afterwards except as it restricts circulation through the mails. Liberty of circulating may be essential to freedom of the press, but liberty of circulating through the mails is not, so long as its transportation in any other way as merchandise is not forbidden.

The act of Congress now called in question does not undertake to say that certain matter shall not be published nor that it shall not be transmitted in interstate commerce. It simply declares that such matter shall not be carried in the United States mails.

In *Ex parte Jackson*, 96 U. S. 727, 24 L. Ed. 877 (1877), the Supreme Court held that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country, and that under it Congress could designate what might be carried in the mail and what excluded. In that case Mr. Justice Field, speaking for the court, said:

"In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press or with any other rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals." * * *

This court holds, therefore, that the Espionage Act, in so far as it excludes from the mails certain matter declared to be unmailable, is constitutional.

The provisions contained in title 12 of the Espionage Act respecting the use of the mails do not abridge the freedom of the press or deprive the complainant of its property within the meaning of the First and Fifth Amendments. Congress has not attempted to prevent the transportation of this publication as merchandise by the railways or by the express companies, and it has not authorized the confiscation of it, neither has it in any way prohibited publication.

In 1798 Congress enacted what is known as the Sedition Law. Act July 14, 1798, c. 73, 1 Stat. 596. It provided, among other things, for the punishment of any person who published any false and malicious thing against the Government of the United States, or any matter intended to excite the people to oppose any law or act of the President in pursuance of law, or to resist, or oppose or defeat any law. The act provoked great resentment throughout the country, and when it expired by its own limitation in 1801 it was not renewed. From that time until the present no similar legislation, so far as we are aware, has been enacted.

The Espionage Act, now under consideration, bears slight resemblance to the Sedition Law of 1798. The act as originally drafted provided that every publication "containing any matter of a seditious, anarchistic, or treasonable character" should be nonmailable. But when the act was under discussion in the Senate the words above quoted were stricken out, it having been objected that they were too indefinite and left too much room for construction. * * *

The Espionage Act being constitutional, the question which arises then is whether the action of the Postmaster General in excluding "The Masses" from the mails warranted the district judge in issuing an injunction commanding him to allow it to be transmitted by mail. The Postmaster General is the head of the Post Office Department. The obligations of his oath of office oblige him to see that the provisions of the Espionage Act are carried into effect, so far as they relate to the use of the mails, and that matter declared by the act to be non-mailable shall be excluded from the mails. The performance of that duty involves the exercise of his judgment and discretion. To what extent can the courts control him by injunction in the performance of this duty? * * *

In *Public Clearing House v. Coyne*, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092, the court held that it was within the power of Congress to entrust the Postmaster General with the power of seizing and detaining letters upon evidence satisfactory to himself, and that his action would not be reviewed by the court in doubtful cases. The act authorized the Postmaster General, upon evidence satisfactory to him that any person who was conducting a scheme or device for obtaining money or property through the mails by fraudulent pretenses, to instruct postmasters at any post office at which registered letters arrived directed to any such persons to return the same to the postmaster at the office at which they were originally mailed with the word "Fraudulent" stamped upon the outside. * * *

This court holds, therefore, that if the Postmaster General has been authorized and directed by Congress not to transmit certain matter by mail and is to determine whether a particular publication is nonmailable, under the law, he is required to use judgment and discretion in so determining and his decision must be regarded as conclusive by the courts unless it appears that it was clearly wrong.

We come, therefore, to consider the authority vested by Congress in the Postmaster General to determine whether he acted within his jurisdiction when he excluded the complainant's magazine from the mails.

* * *

The excluded publication is a magazine known as "The Masses." By its own statement it is a radical and revolutionary publication—not revolutionary, however, in that it desires to overturn existing forms of government by force of arms, as it is opposed to war. It is revolutionary not only in matters political but in art and literature and religion as well. It is a monthly publication of about 50 pages, and has a circulation of from twenty to twenty-five thousand copies each month. For a number of years it has passed freely through the mails to its subscribers throughout the United States.

The objectionable matter was contained in the August issue, and consisted of certain articles. These were entitled: "A Question," "A Tribute," "Conscientious Objectors," "Friends of American Freedom." Besides these articles there were four cartoons which were also objected to. These were entitled: "Liberty Bell," "Conscription," "Making the World Safe for Capitalism," and "Congress and Big Business."

In the article entitled "A Question" the editor writes:

"I would like to know to-day how many men and women there are in America who admire the self-reliance and sacrifice of those who are resisting the conscription law on the ground that they believe it violates the sacred rights and liberties of man. How many of the American population are in accord with the American press when it speaks of the arrest of these men of genuine courage as a 'round-up of slackers'? Are there none to whom this picture of the American Republic adopting towards its citizens the attitude of a rider toward cattle is appalling? I recall the essays of Emerson, the poems of Walt Whitman, which sounded a call never heard before in the world's literature for erect and insuppressible individuality, the courage of solitary faith and heroic assertion of self. It was America's contribution to the ideals of man.

* * * I wonder if the number is few to whom this high resolve was the distinction of our American idealism, and who feel inclined to bow their heads to those who are going to jail under the whip of the State because they will not do what they do not believe in doing? Perhaps there are enough of us, if we make ourselves heard in voice and letter, to modify this ritual of contempt in the daily press and induce the American Government to undertake the imprisonment of heroic young men with a certain sorrowful dignity that will be new in the world."

The article idealizes those who resist the conscription law and it represents them as heroic. In saying that the law violates sacred rights

and is contrary to liberty and that those who refuse to submit to it are heroes it incites disobedience to the statute. * * *

The cartoon entitled "Conscription" portrays a youth lying across the mouth of a cannon with his arms chained to the wheels of the gun carriage. "Democracy," in the form of a nude woman, is tied by her extended arms and her crossed feet to a wheel. And "Labor," crouched down on the gun carriage, a pitiable object, is fastened in like manner. A woman is on her knees on the earth at the side of the cannon in utter despair, with her head bent back and her arms uplifted, while a child lies neglected at her side. The counsel for the complainant admits in his brief that this cartoon "is a powerful argument against the conscription law. It says, in effect, that the youth of the land are by it forced into military service; that the law binds labor to military service as well; that it causes great agony and suffering to the womanhood of the country, and that the mothers of the country with children too small to be subject to the 'draft' pray to God that the draft law may be repealed before their children come to military age, and that democracy is trampled under foot by such a law. That is what this picture says." But that is not what it says to us. It seems to us to say, "This law murders youth, enslaves labor to its misery, drives womanhood into utter despair and agony, and takes away from democracy its freedom." Its voice is not the voice of patriotism and its language suggests disloyalty.

If counsel wished the court to understand that in his opinion the effect of the cartoon would not be to interfere with enlistment, we are not able to agree with him. That it would interfere and was intended to interfere was evidently the opinion of the Postmaster General. And this court can not say that he was not justified in his conclusion. * * *

It may be conceded that the language of the statute can not have one meaning in an indictment and another when the question arises respecting the exclusion of matter from the mail as containing that which violates the provisions of section 3 of title 1. If the magazine is nonmailable under that section it may be that the editor has committed a crime in publishing it for which upon conviction he may be fined not more than \$10,000 or imprisoned for not more than 20 years, or both. The district judge thought no crime had been committed and that the magazine was therefore mailable because the publication did not in so many words directly advise or counsel a violation of the act. He declared that—

"If one stops short of urging upon others that it is their duty or their interest to resist the law it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal. I am confident that by such language Congress had no such revolutionary purpose in view."

This court does not agree that such is the law. If the natural and reasonable effect of what is said is to encourage resistance to a law and the words are used in an endeavor to persuade to resistance, it is immaterial that the duty to resist is not mentioned or the interest of the

persons addressed in resistance is not suggested. That one may willfully obstruct the enlistment service without advising in direct language against enlistments, and without stating that to refrain from enlistment is a duty or in one's interest seems to us too plain for controversy. To obstruct the recruiting or enlistment service within the meaning of the statute it is not necessary that there should be a physical obstruction. Anything which impedes, hinders, retards, restrains, or puts an obstacle in the way of recruiting is sufficient. In granting the stay of the injunction until this case could be heard in this court upon the appeal, Judge Hough declared that "It is at least arguable whether there can be any more direct incitement to action than to hold up to admiration those who do act. *Oratio obliqua* has always been preferred by rhetoricians to *oratio recta*; the beatitudes have for some centuries been considered highly hortatory, though they do not contain the injunction 'Go thou and do likewise.'" With this statement we fully agree. Moreover it is not necessary that an incitement to crime must be direct. At common law the "counseling" which constituted one an accessory before the fact might be indirect. See Wharton's Criminal Law (11th Ed.) § 266.

Bishop lays down the rule thus:

"Everyman is responsible criminally for what of wrong flows directly from his corrupt intentions. * * * If he awoke into action an indiscriminate power, he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what he might have foreseen would be the understanding, he is responsible." 1 Bishop on Criminal Law, § 641.

And in *Regina v. Sharpe* (3 Cox's C. C. 288) it is laid down that—

"He who inflames people's minds and induces them by violent means to accomplish an illegal object is himself a rioter, though he takes no part in the riot."

In conclusion, we are satisfied that the publication involved contains no matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States in violation of section 2 of title 12. The Postmaster General's exclusion of the publication from the mails is not put on the ground that it contained any such matter.

It is not so clear that the publication is free from matter which involves an attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States. The Postmaster General thought it contained matter objectionable on that ground, and a difference of opinion upon that phase of the matter is possible.

The question whether the publication contained matter intended willfully to obstruct the recruiting or enlistment service is less doubtful. Indeed the court does not hesitate to say that, considering the natural and reasonable effect of the publication, it was intended willfully to obstruct recruiting. And even though we were not convinced that any such intent existed and were in doubt concerning it, the case would be governed by the principle that the head of a department of the Government, in a doubtful case, will not be overruled by the courts in a matter which involves his judgment and discretion and which is within his jurisdiction.

The order granting the preliminary injunction is reversed.

WARD, Circuit Judge (concurring). I think the sole ground on which the order of the Postmaster General can be sustained is that some parts of the August number of "The Masses" were intended to obstruct and do obstruct the recruiting or enlistment service of the United States. This involves a conclusion of fact to be drawn by him from the cartoons and text of this particular number. Advice to resist the law may be indirect as well as direct, and the conclusion of the Postmaster General in matters of fact, whether we agree with him or not, is final. I think it important, however, to say that not every writing the indirect effect of which is to discourage recruiting or enlistment is within the statute. In addition to the natural effect of the language on the reader, the intention to discourage is essential. Arguments in favor of immediate peace or in favor of repealing the conscription act do this indirectly. It is, notwithstanding, the constitutional right of every citizen to express such opinions both orally and in writing, and Congress can not be presumed to have intended by the Espionage Act to authorize the Postmaster General to exclude such articles written honestly and without the intention of advising resistance to the law. His authority in the premises depends exclusively upon the statute.

* * *

5. UNITED STATES v. SUGARMAN.

(District Court of the United States, District of Minnesota, Second Division, 1917. 245 Fed. 604.)

Mr. Stedman: Now comes the defendant, Abraham L. Sugarman, in person and by his attorneys, and moves the court to direct the jury to return a verdict of not guilty, and for reason thereof assigns as follows:

First, that the indictment does not state an offense; second, that the evidence is insufficient and not of sufficient weight or character to justify submitting the case; third, that the evidence does not sustain the alleged crime charged in the indictment.

BOOTH, District Judge. The motion is a rather broad one, and the argument has naturally taken a somewhat broad scope. The motion, I take it, in its present form practically covers the same ground as the demurrer that was interposed to the indictment, and the motion to quash the indictment, and also the more limited motion to direct a verdict for lack of evidence to go to the jury.

It is insisted by counsel for the defendant not only that the indictment does not state facts sufficient in law to constitute an offense, but also that, under the evidence as disclosed on the part of the Government, a good indictment can not be drawn under section 3 of the espionage law (Act June 15, 1917, c. 30, 40 Stat. 217) to cover the facts disclosed. These questions as to whether the indictment states facts in sufficient form, and whether the facts stated are sufficient in law, are somewhat intimately connected and have been argued more or less together, so that they may be properly treated more or less together.

The indictment is drawn under section 3 of the so-called Espionage Law, Act of June 15, 1917, and so far as this case is concerned, that section reads as follows:

"Whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States shall be punished."

Now, the indictment drawn under that section is substantially as follows: That on the 24th of July, 1917, the United States being then and there at war, Abraham L. Sugarman, in the county of Sibley, State and district of Minnesota, and within the jurisdiction of this court, did willfully attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States, by then and there urging, counseling, and advising a number of young men (named) not to report when ordered so to do by military authorities of the United States for military service, they, the said young men, being the persons who had theretofore registered for service in the military forces of the United States in accordance with the act of Congress of May 18, 1917 (40 Stat. 76), and the rules and regulations promulgated by the President. Now, the ordinary tests for sufficiency of an indictment as to form are that it shall be sufficiently definite to acquaint the defendant with what charge he has to meet upon the trial, and also sufficiently definite and certain so that if he either is convicted or acquitted he may thereafter plead the judgment in any other prosecution that may be brought against him for the same offense; and, third, that the court may be acquainted with what is charged, so that it may determine whether or not the facts, if they are proven, constitute an offense in law within the statute under which the indictment is drawn.

Now, it seems to me, applying those tests to this indictment, that as to the formal requisites it is sufficient; it acquaints the defendant with the time and place of the offense; it acquaints him with the fact that it is claimed that then and there he attempted to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States; and it acquaints him with how it is claimed that was done, by urging certain young men there not to report for military duty, and that these young men were men who had been registered under the act of Congress. * * *

There is a further question raised by this motion, and that is as to the status of these men in whom it is claimed this attempt was made to produce disloyalty and refusal of duty. The indictment alleges that these men had registered. It also alleges that an attempt was made to cause disloyalty and refusal of duty in the military forces of the United States. The evidence shows that the young men in question, named in the indictment, had registered. It also shows that they had received their serial numbers under the draft act. The indictment does not allege that to be the case, but the proof shows it, and no point is made that the indictment does not state that particular fact. And, of course, the date of making the drawing is an historical fact of which the court would take judicial notice without proof.

Now, the defendant claims that these men were not in actual military service, but the Government contends that the men were in the military forces of the United States, and that is the most important question that is raised by this motion. I am sorry that I have not had an opportunity myself to investigate more thoroughly this question. It is, I think, a very important question, and so far as I know has not yet been passed upon under the present law. The section itself reads:

"Whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States shall be punished."

It doesn't use the language "In persons in the military service of the United States." And the question arises whether those two expressions are synonymous, whether the "military forces of the United States" may not be broader in scope than "persons in the actual military service of the United States." This word "forces" is used in a number of places in the statutes of the United States. It is also found in the Constitution of the United States. In section 8 of article 1 of the Constitution of the United States, enumerating the powers of Congress, amongst others, are these: "to raise and support armies; to provide a navy; to make rules for the governing and regulation of the land and naval forces." Now, whether the words "land and naval forces" there are exactly synonymous with the words "army and navy," is a question that might well bear close investigation. In chapter 187, volume 30, Statutes at Large, page 361 (Comp. St. 1916, § 1714), which was the act providing for the raising of the army for the Spanish-American war, we find this language:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all able-bodied male citizens of the United States and persons of foreign birth who shall have declared their intention to become citizens of the United States under and in pursuance of the laws thereof, between the ages of eighteen and forty-five years, are hereby declared to constitute the national forces, and, with such exceptions and under such conditions as may be prescribed by law, shall be liable to perform military duty in the service of the United States."

So far as I am advised, this section has not been repealed. Now, it seems to me there is a clear distinction between the expression "national forces," as used there, and persons in the actual military service of the United States. In the National Defense Act, which was passed in June, 1916, we find this language, in section 111 (Comp. St. 1916, § 3045):

"When Congress shall have authorized the use of the armed land forces of the United States for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, under such regulations, including such physical examination as he may prescribe, draft into the military service of the United States, to serve therein for the period of the war, unless sooner discharged, any

and all members of the National Guard and of the National Guard Reserve."

There, again, a distinction is made between the forces of the United States and persons in the actual military service of the United States. As I say, I have not had an opportunity to investigate this question carefully; but I have concluded, from reading these laws and from considering the purpose of the laws, that the military forces of the United States are, at any particular time, what Congress declares them to be. By the Act of April 22, 1898 (30 Stat., p. 361), the national forces were declared to be male persons, citizens and certain others, between the ages of 18 and 45. By the Act of May 18, 1917, the selective-draft act, Congress designated a class of persons between the ages of 21 and 31 from whom should be drawn an army for active military service. Registration was the first step in the organizing of the army, the first step in bringing this class of men, or certain members of it, into active military service, and the drawing of the numbers at Washington on July 20 was a second step, and other steps, of course, would be those taken by the local boards and the district boards, until finally a man would either be excused or rejected or become a member of the army in active military service. Considering, therefore, the broad purposes of this act of May 18, 1917, considering the evils that were intended to be met by section 3 thereof, considering the language of the section, I am of the opinion that the words "military forces" therein should be given a broad, rather than a narrow, meaning and should be held to mean not merely the men that are in active military service but also men who had registered and had received their serial numbers from Washington; and that is as far as is necessary to hold in this particular case. If that construction is the proper one, then the indictment in that respect is sufficient, inasmuch as these men named in the indictment were within the class of persons constituting "the military forces of the United States" at the time and place in question. And the evidence supports the allegation of the indictment that these men named had in fact registered, and also shows that they had in fact received their serial numbers.

It seems to me, therefore, under the circumstances, that the indictment is sufficient, and that the evidence is of such character and amount as requires the submission of the case to the jury; therefore the motion for a directed verdict will be denied.

6. In re GERLACH.

(District Court of the United States, Southern District of New York, 1917.
247 Fed. 616.)

AUGUSTUS N. HAND, District Judge. Charles E. Gerlach, an employé of the United States Shipping Board, went to Europe as mate on the steamship McClellan, a vessel apparently in use as a military transport, though this fact was not definitely proved. He was there discharged and sent back on the *El Occidente*, an army transport, to New York. He volunteered to stand watch, and for several days

did this, but finally refused to continue. For this disobedience to the military order of an army officer he was tried by a court-martial and sentenced to five years imprisonment.

The second article of war (R. S., 1342, as amended by the act of Aug. 29, 1916, 39 Stat. 651 [Comp. St. 1916, § 2308a]), reads as follows:

"The following persons are subject to the Articles of War:

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to the Articles of War."

I think Gerlach was a person accompanying the Army of the United States, and also voluntarily serving with the armies of the United States at the time he disobeyed the order. I further hold that he was "in the field" and without the territorial jurisdiction of the United States within the meaning of the article. The words "in the field" do not refer to land only, but to any place, whether on land or water apart from permanent cantonments or fortifications, where military operations are being conducted. In this case he was on an army transport and peril from submarines existed when he refused to stand watch. The captain in charge of the vessel had, in my opinion, the right to call upon all persons on board to protect the transport in any way that seemed best in view of the danger. The section of the Articles of War subjecting persons accompanying armies to military authority not only enables military officers to preserve order on the part of such persons, but also in the cases that it covers to call on them for assistance and direct their action while they are properly in the field of military operations. The court-martial, therefore, had exclusive jurisdiction by the terms of the Articles of War over this man, who not only accompanied the Army but volunteered to serve, unless the act of Congress which adopted the Articles of War is unconstitutional.

Section 8 of Article 1 of the Constitution is the source of authority for the Articles of War. Congress is thereby given power to raise and support armies, to make rules for the government of land and naval forces, and to make all laws which shall be necessary for carrying into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States. This is in aid of the general war power and ought to be given a broad scope in order to give the fullest protection to the Nation. That an officer should be able to call upon a person accompanying the military forces, who had volunteered and indeed asked to stand watch as Gerlach had, to protect a transport and its occupants in time of danger by standing watch, is certainly within the fair object of the Articles of War, and is a reasonable power for carrying into execution the government of military forces. The act is, therefore, in my opinion, constitutional.

The writ was properly dismissed and the prisoner remanded to the custody of the military authorities.

7. Ex parte GRABER.

(District Court of the United States, Northern District of Alabama, Southern Division, 1918. 247 Fed. 882.)

CLAYTON, District Judge. This application for habeas corpus is filed by Oscar Graber, who alleges that he is unlawfully restrained of his liberty by the United States marshal for the northern district of Alabama. Petitioner avers that he was "formerly a citizen of Croatia, a subject State of the Kingdom of Hungary, a part of the Imperial Austro-Hungarian Government"; that about 15 years ago the petitioner came to the United States and upon reaching the age of 21 years declared his intention of becoming a citizen of the United States and later filed a petition for naturalization. Graber further avers that since the issuance of the proclamation of the President of the United States on December 11, 1917, he has been held in confinement by the United States marshal, and it appears that he is confined as an alien Austrian enemy under authority from the President.

Under the provisions of the President's proclamation, all natives, citizens, denizens, or subjects of Austria-Hungary, being males of the age of 14 years and upward, who shall be within the United States and not actually naturalized and "of whom there may be reasonable cause to believe that he is aiding or about to aid the enemy, or who may be at large to the danger of the public peace or safety, or who violates or attempts to violate, or of whom there is reasonable ground to believe that he is about to violate any regulation duly promulgated by the President, or any criminal law of the United States, or of the States or Territories thereof, will be subject to summary arrest by the United States marshal, or his deputy, or such other officer as the President shall designate, and to confinement in such penitentiary, prison, jail, military camp, or other place of detention as may be directed by the President."

This proclamation was issued shortly after the passage of the joint resolution of the Senate and House of Representatives, dated December 7, 1917, declaring a state of war to exist between the United States and the Imperial and Royal Austro-Hungarian Government, and authorizing the President to employ the entire naval and military forces of the United States and the resources of the Government to carry on the war and to bring the conflict to a successful termination.

Section 4067, Revised Statutes (Comp. Stat. 1916, § 7615), is as follows:

"Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of 14 years and upward, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed, as alien enemies. The President is authorized, in any such event, by his proclamation

thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable, the manner and degrees of restraint to which they shall be subject, and in what cases, and upon what security their residence shall be permitted and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom, and to establish any other regulations which are found necessary in the premises and for the public safety."

1. From what has been said above, it will be observed that Graber, the petitioner, has never actually been naturalized. Of course, his mere declaration of intention to become a citizen of the United States, such declaration never having been carried into effect, did not confer citizenship upon him; and such declaration of intention did not absolve Graber from the allegiance which he owes to the Austro-Hungarian Government. He did not by his declaration of intention renounce his allegiance; but merely declared that it was his intention to do so at some future time; and so long as his foreign allegiance continues he remains an alien. *Minneapolis v. Reum*, 56 Fed. 576, 6 C. C. A. 331; *In re Moses* (C. C.) 83 Fed. 995. Graber has not divested himself of his alienage and can not do so until he becomes an American citizen by naturalization. It can not be doubted that by the declaration of war he became in law an alien enemy, one who owes allegiance to an adverse belligerent. *Lamar v. Browne*, 92 U. S. 187, 23 L. Ed. 650.

2. The statutes of the United States provide two methods by which alien enemies may be restrained or removed. Under section 4067, Revised Statutes (U. S. Comp. Stat. 1916, § 7615), quoted above, the President may direct the manner and degree of the restraint to which alien enemies shall be subject and he is authorized to provide for the removal from the country of those who, not being permitted to reside within the United States, neglect or refuse to depart therefrom. Under section 4069, Revised Statutes United States (U. S. Comp. Stat. 1916, § 7617), courts of the United States having criminal jurisdiction are authorized after complaint and upon hearing to cause alien enemies to be apprehended and confined or removed. This last section, however, is not a limitation or restriction upon the power given the President by section 4067, Revised Statutes, but provides an additional method of dealing with alien enemies. It is clear that Congress did not intend that the power conferred on the President by section 4067, Revised Statutes, to remove alien enemies, should be exercised only as provided in section 4069, Revised Statutes, which requires a complaint against an alien enemy and a hearing. This latter method, with its attendant public trial, would oftentimes prove inadequate and ineffective, and the inevitable disclosing of facts would not always be best for the safety of the peace and security of the Government. Congress recognized this and by the provisions of section 4067, Revised Statutes, vested the President with summary power to direct the confinement or removal of alien enemies.

3. Graber, in his petition for the writ, says that he has done nothing and contemplates doing nothing forbidden by the President's proclamation. His petition, then, in its last analysis is reduced to a peti-

tion asking the court to review a disputed question of fact. Graber, as an alien enemy and admittedly such by his own petition, confined by direction of the Executive, through the appropriate officers of the Government, on the ground that he is about to violate a regulation duly promulgated by the President under the authority of Congress, can not be permitted to negative the fact or the intention by the application of habeas corpus. Disputed questions of fact can not be reviewed on habeas corpus. *In re Strauss*, 126 Fed. 327, 63 C. C. A. 99.

4. The President, acting in the manner and under the powers vested in him by law, has determined that the petitioner is a person who, either for the safety of the United States or for the petitioner's own protection, should be restrained or interned. He has further decided that this alien enemy should be restrained as prescribed in section 4067, Revised Statutes. The officers of the law have taken the summary action authorized by that section and the question is presented by petitioner whether this action of the President is subject to judicial review. The court thinks not.

The case of *In re Moyer*, 35 Colo. 159, 85 Pac. 190, 12 L. R. A. (N. S.) 979, 117 Am. St. Rep. 189, holds, and it is sound in principle and applicable here, that the decision of the chief executive of a State in suppressing insurrection is not subject to review in the courts. In that case Moyer, the petitioner, was arrested by authority of the commanding officer of the Colorado National Guard to prevent Moyer from taking part in an insurrection which the civil authorities have been unable to put down. The governor of Colorado, acting under the authority conferred upon him by law, called out the militia to suppress the insurrection and restore law and order. The court said:

"By the reply it is alleged that, notwithstanding the proclamation and determination of the governor that a state of insurrection existed in the county of San Miguel, as a matter of fact these conditions did not exist at the time of such proclamation or the arrest of the petitioner, or at any other time. By section 5, article 4, of our constitution the governor is the commander in chief of the military forces of the State * * * and he is thereby empowered to call out the militia to suppress insurrection. It must therefore become his duty to determine as a fact when conditions exist in a given locality which demand that, in the discharge of his duties as chief executive of the State, he shall employ the militia to suppress. This being true, the recitals in the proclamation to the effect that a state of insurrection existed in the county of San Miguel can not be controverted. Otherwise the legality of the orders of the executive would not depend upon his judgment, but the judgment of another coordinate branch of the State government. *In re Boyle*, 6 Idaho, 609, 57 Pac. 706, 45 L. R. A. 832, 96 Am. St. Rep. 286; *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581; *Ex parte Moore*, 64 N. C. 802; *Martin v. Mott*, 12 Wheat. 19, 6 L. Ed. 537.

And further in the additional opinion of the Chief Justice (35 Colo. 218, 85 Pac. 209, 12 L. R. A. [N. S.] 979, 117 Am. St. Rep. 189) it is said:

"If the judicial department should undertake to review the facts upon which the governor acted, it would be a direct interference with

his authority and an assumption of power on the part of the judiciary which does not exist."

The case of *In re Boyle*, 6 Idaho, 609, 57 Pac. 706, 45 L. R. A. 832, 96 Am. St. Rep. 286, cited in the opinion in the Moyer Case, is also in point. There the President of the United States at the request of the governor of the State sent a military force into the State. Application for habeas corpus having been made, the court held that it would not review the action of the governor, and said:

"* * * It is not the province of the court to hinder, delay, or place obstruction in the path of duty prescribed by law for the executive, but rather to render him all the aid and assistance in his power to bring about the consummation most devoutly prayed for."

It may well be said of the power conferred upon the President to remove alien enemies, as was said of the power conferred upon him to call forth the militia to suppress insurrections:

"Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. *Martin v. Mott*, 12 Wheat. 19, 31, 6 L. Ed. 537."

The Court is of the opinion that such is the true construction of section 4067, Revised Statutes United States and that the President, or the officers through whom he acted, is the exclusive judge of whether Graber was such an alien enemy as for the safety of the United States should be restrained as provided by law.

"It is no answer, that such power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government the danger must be remote, since, in addition to the high qualities which the executive must be presumed to possess, of public virtue, the honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny." *Martin v. Mott*, supra.

The principles governing the determination of this case are analogous to the principles applied when habeas corpus is sought to review decisions of the Secretary of Labor and other immigration officials, under the Immigration Act, that certain alien immigrants at the time of entering the United States were likely to become a public charge. It has generally been held that the decisions of the Secretary, after the administrative hearing provided for by the act, are final and that the courts are without power to review or modify them on application for habeas corpus. *Ex parte Pugliese* (D. C.) 209 Fed. 720. And the same is true of the decisions of the boards created under the Conscription Act in passing upon claims for exemption. Indeed the recent case of *Angelus v. Sullivan*, 246 Fed. 54, 158 C. C. A. 280, is somewhat similar to this case. *Angelus* instituted a suit in the United States District Court for the Southern District of New York, for the purpose of securing a review of the action taken by the local and district boards created under the Conscription Act, approved May 18, 1917, 40 Stat. 76. He alleged that he was a subject

of Austro-Hungary, and an alien who had not declared his intention to become a citizen of the United States; and that as such he was not subject to conscription. He also averred that he had filed an affidavit claiming exemption on this ground; that the local board denied his claim for exemption, and that upon appeal the district board affirmed the ruling of the local board and Angelus was ordered to report for military service. The court held that the decision of the board denying Angelus's claim of exemption, on the ground that he was a subject of Austria-Hungary, was final and could not be interfered with by the courts.

It is interesting to note in the present circumstances that the principles stated above are also followed in the English and Canadian courts. In the annotated note following the report of the case of *Porter v. Freudenberg* (English Court of Appeals) 1 K. B. 857, 1915, 5 B. R. C. 600, are cited the cases of *Rex v. Vine Street Police Station* (1915) 113 L. T., N. S., 971, and *In re Gusetu*, 1915, 29 Can. Crim. Cas. 427, holding that the rule that a court will not entertain an application for habeas corpus from a prisoner of war applies to a civilian subject of an enemy state, who has been interned as a measure of public safety.

In this case, the President, under the authority conferred upon him by law and in the manner prescribed by section 4067, Revised Statutes, has acted through the proper officials and their determination that Graber is an alien enemy who should be restrained or interned is final and conclusive and is not the subject of review by the courts.

The application for the writ is denied.

8. FRANKE v. MURRAY.

(Circuit Court of Appeals of the United States, Eighth Circuit, 1918. 248 Fed. 865, 160 C. C. A. 623.)

The appellant, a citizen of the United States, between the age of 21 and 31, filed a petition for a writ of habeas corpus, alleging that he is unlawfully imprisoned and deprived of his liberty by the respondent, commandant of Jefferson Barracks, in the county of St. Louis, State of Missouri. He stated in his petition that he was duly enrolled and registered under the act of Congress of May 18, 1917, known as the "Selective Draft Act (40 Stat. 76)"; that subsequently he was informed by notice from the local board that he had been drafted for service in the military establishment of the United States under said act of Congress; that in response to said notice he attended upon said board, and claimed exemption under the terms of said act, on the ground that he was a member of a well-recognized religious sect and organization, whose principles and creed forbid its members participating in war in any form, and that his religious convictions were against war or participation therein, which claim was by the board rejected; that having been found physically qualified for service, he was duly notified to report for transportation to a military encampment of the United States, for the purpose of being

assigned to duty as a member of said military establishment of the United States; that he refused to appear in response to the notice given him, whereupon he was arrested and taken into custody by direction of the board, and turned over to the respondent as a deserter from the Army of the United States, to be tried by a court-martial; that his detention is without due process of law and in violation of the Constitution.

Upon presentation of the petition, a writ of habeas corpus was granted by the district court. The respondent produced the appellant and made a return to the writ, denying that the petitioner was a member of any religious sect or organization, whose creed and principles forbade its members to participate in war in any form. The response also set up all the steps which were taken by the board and which were in strict conformity with the act of Congress, and the mobilization regulations of the President of the United States.

To this return the petitioner filed what may be termed a reply, denying that he deserted the military service of the United States, and that he was a deserter, as he never was in the military service of the United States, never having taken the oath as a soldier.

The hearing was had on the pleadings, no evidence being introduced by either party, whereupon the writ was discharged, and the appellant remanded to the custody of the respondent. From this judgment this appeal is being prosecuted.

Before HOOK and SMITH, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge, after stating the facts as above, delivered the opinion of the court.

The grounds upon which it is sought to reverse the judgment of the court below are:

1. That in order to be a deserter one must be in the actual military service, and that until he has been sworn in as a soldier he has not lost his status as a civilian.

2. If he has committed any offense, or violated any of the laws of the United States, he subjected himself to civil prosecution only, under the provisions of section 6 of the conscription act.

3. That Congress had no power to authorize the President to make any rules and regulations which should have the effect of law, that being a delegation of legislation which is not permissible under the Constitution.

As to the last claim it is sufficient to say, that it was adversely disposed of by the Supreme Court in *Arver v. United States*, 245 U. S. 366, 38 Sup. Ct. 159, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856, opinion filed Jan. 7, 1918.

To sustain the first proposition, counsel rely on *Houston v. Moore*, 5 Wheat. 1, 5 L. Ed. 19, and *In re Grimley*, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636. Neither of these cases is applicable to the issues in this case or the acts of Congress under which appellant is held. In *Houston v. Moore* the question before the court was whether a statute of the State of Pennsylvania, which provided that a militiaman of that State was subject to trial by a court-martial of the State for failing to respond when called, was constitutional. The contention was that Congress alone had that power, and a statute of

a State is therefore unconstitutional. This was denied by the highest court of the State of Pennsylvania, and upon writ of error to the Supreme Court of the United States that judgment was affirmed, the court holding that in the absence of action by Congress the State possessed that power.

In *re Grimley* the only question involved was that of a voluntary enlistment, hence does not apply to a selective draft act, such as is the act of Congress of May 18, 1917. *McCall's Case*, Fed. Cas. No. 8669. Section 2 of the selective draft act provides: "All persons drafted into the service of the United States * * * shall from the date of said draft or acceptance be subject to the laws and regulations governing the Regular Army." This, of course, includes the Articles of War, as members of the Regular Army are subject to trial by court-martial. Article 2 of the Articles of War (section 1342, Rev. Stat., as amended by Act of Aug. 29, 1916, c. 418, 39 St. 650, U. S. Comp. St. 1916, § 2308a), provides:

"Persons subject to military law: The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles: Provided, That nothing contained in this act, except as specifically provided in article 2, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction, unless otherwise specifically provided by law.

"(a) All officers and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft or order to obey the same."

There is, therefore, no room for doubt that under the selective draft act, and the Articles of War, the appellant having been drafted into the service of the United States, he became from the date of said draft, and certainly after acceptance and notice, subject to the laws and regulations governing the Regular Army, including the Articles of War. The laws governing voluntary enlistments can not be applied to involuntary enlistments by draft or conscription.

It is also claimed that the time when he became a soldier within the meaning of the law is regulated by article 109 of the Articles of War, but that article only refers to voluntary enlistments. It reads: "At the time of his enlistment every soldier shall take the following oath or affirmation," and then follows the form of the oath. But as the petitioner did not enlist, but was drafted under the selective draft act, this article does not apply.

The claim that, if the petitioner committed any offense he can only be prosecuted in a civil court, and that therefore a court-martial is without jurisdiction, is equally untenable. The contention of counsel is, that as section 6 of the selective draft act makes it a misdemeanor to violate any of the provisions of the act or the regulations made thereunder, the appellant can only be tried in a civil court. But that section expressly excepts those subject to military laws. It therefore applies only to those "not subject to military

laws," and as we hold that the petitioner is, under the selective draft act, subject to military law, the contention must fail.

The claim of appellant that he is a member of a well-recognized religious sect or organization, whose creed and principles forbid the members participating in war in any form, can not be raised in a collateral proceeding like this. That was a question to be determined under the act of Congress, first by the local board, and upon appeal by the district board. That provisions of this nature constitute due process of law, under the constitutional guarantee, has been frequently and uniformly held. That it applies to the act in question has been decided by the United States Circuit Court of Appeals for the Second Circuit in *Angelus v. Sullivan*, 246 Fed. 54, 158 C. C. A. 280; and by District Courts in *United States ex rel. v. Heyburn*, 245 Fed. 360, *In re Hutfis*, 245 Fed. 798, and *United States ex rel. v. Finley*, 245 Fed. 871. It is only when the action of such a board was without jurisdiction, or if having jurisdiction, it failed to give the party complaining a fair opportunity to be heard and present his evidence, that the action of such a tribunal is subject to review by the courts. *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369; *Gegiow v. Uhl*, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114. But no such claim is made by appellant. On the contrary he admits in his petition that he had a fair opportunity to be heard and present his evidence.

It is further claimed that article 2 of the Articles of War was repealed by implication by section 6 of the selective draft act. But there is no merit in this claim. Repeals by implication are never favored, and only when the two acts are totally inconsistent and irreconcilable will the older act be held to be repealed by the later. No repugnancy has been pointed out by counsel and none can be found. *Frost v. Wenie*, 157 U. S. 46, 15 Sup. Ct. 532, 39 L. Ed. 614; *United States v. Greathouse*, 166 U. S. 601, 17 Sup. Ct. 701, 41 L. Ed. 1130; *Washington v. Miller*, 235 U. S. 422, 428, 35 Sup. Ct. 119, 59 L. Ed. 295; *Chase v. United States*, 238 Fed. 887, 152 C. C. A. 21. In *Washington v. Miller*, the court said: "Such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably can not be given to both."

The judgment of the district court was right and is affirmed.

9. UNITED STATES *ex rel.* BARTALINI *v.* MITCHELL.

(District Court of the United States, Eastern District of New York, 1918.
248 Fed. 997.)

CHATFIELD, District Judge. A writ of habeas corpus has been issued under the authority of *Angelus v. Sullivan*, 246 Fed. 54, 158 C. C. A. 280, upon which Bartalini has been produced, return filed, and argument had upon the record. None of the facts have been traversed.

Bartalini is a Russian alien, who took out his first papers but allowed seven years to elapse, and thus lost the right to become at once a citizen of the United States. The record shows that he noti-

fied the local board of these facts, but was certified for duty as a declarant.

He took an appeal, which was dismissed, and was at Camp Upton when the writ of habeas corpus was issued.

The decision of the Supreme Court in the Case of Antonio Moreno, 245 U. S. 392, 38 Sup. Ct. 151, 62 L. Ed. —, January 7, 1918, establishes the proposition that Bartalini could not become a citizen by the use of his old declaration of intention. It is contended, therefore, on his behalf, that Bartalini is an alien and not a declarant within the meaning of those terms under the Selective Service Law, 40 Stat. 76.

But such a conclusion would in many instances defeat the evident purpose of the law. Bartalini was of the age required to register, and, as a matter of fact, he had declared his intention to become a citizen. The basis of the seven-year limitation upon the use of first papers is not a presumption that the person neglecting to become a citizen has resumed his old and interrupted allegiance to a foreign power. This presumption happens only if the alien has also left the United States. But a declarant must make use of his papers within the seven years solely because Congress has enacted a statute which places that limit upon the use of the old declaration of intention in filing a petition to become a citizen. During all of these seven years he is a declarant. Thereafter, and so long as he is in this country, he remains a declarant, since he is in the position of having stated his intention to become a United States citizen and to give up his former allegiance. He may prove the continuation of this intention by filing a new declaration. But he does not at the end of seven years resume, in all respects, the national rights of those who have never filed such a declaration.

Legislation has frequently been proposed extending the seven-year period, and in many circuits in the United States those who held declarations of intention filed under the former law could, until the Moreno decision, become citizens at any time upon making application. There is nothing in the Selective Service Act to indicate that Congress intended to limit the draft to those who had become declarants within seven years, and, on the contrary, the language used expresses the intention of Congress to include all males not alien enemies who were not still plainly insisting upon their status as aliens before the passage of the draft law.

The question of drafting aliens who have filed a declaration of intention might be raised as the basis for the discussion of treaty provisions, but in the meantime Congress certainly has the right to include such a man in the draft law.

This court will not hold that a man who has severed his relations by declaring his intention to renounce his allegiance to his former sovereign, and who may even during the war reaffirm that intention so as to escape military service for his native land, can successfully resist the act of Congress which asserts rights on the part of the United States under which he can be compelled to do his duty for the United States until and unless his former sovereign changes those rights by the negotiation of a treaty.

But if not considered a declarant, the relator can not be discharged, because of the provisions of the Selective Service Law.

It has been held in a number of cases under the Selective Draft Act that the provisions of section 4, making the decision of the district board final unless overruled on direct appeal to the President, are sufficient to show an express direction of Congress; that the machinery of the draft law is to be carried out in accordance with the language of the statute, and in no other way.

In *Angelus v. Sullivan*, supra, this matter has been discussed at length. It was there held that a court could inquire, by way of habeas corpus or certiorari, into the proceedings of the bodies created by the draft law only to the extent of seeing whether they were acting entirely outside the law by which they were created; in other words, whether they were acting without jurisdiction.

It is evident that a determination by a body, which is in fact acting without jurisdiction, that the subject matter as to which action is being taken is properly before that body and that its jurisdiction extends thereto can be tested by habeas corpus.

A number of cases are cited in the *Angelus* decision to that effect. But it was held in the *Angelus* Case, as in *U. S. ex rel. Koopowitz v. Finley*, 245 Fed. 871 (Mayer, J., D. C. S. D. N. Y.); *Ex parte Hutflis* (D. C.) 245 Fed. 798; *U. S. ex rel. Cubyluck v. Bell*, 248 Fed. 995 (Veeder, J., D. C. E. D. N. Y.); *U. S. ex rel. Troiani v. Heyburn*, 245 Fed. 360 (Dickinson, J., D. C. E. D. of Pa.), that a determination by the local and district boards on any question of fact or of law, within the scope of their jurisdiction, was final, except on appeal to the President. It was also held in these cases, and particularly in the *Koopowitz* Case, that failure to follow the procedure established by the draft law was equivalent to a waiver of the right to seek exemption. It was also held that the word "exemption" included a claim of absolute exception from the class of those liable to be drawn for military service.

The Selective Service Law does not set forth these various provisions in sequence.

Section 1 authorizes the President to raise the increased forces of the Army in various ways, one of which is by draft.

Section 2 provides that this draft shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of 21 and 30 years, both inclusive.

But thereafter the law provides, in section 5, that all male persons between the ages of 21 and 30, both inclusive, must register. This provision establishes a class which includes alien enemies and aliens who have not filed a declaration of intention. These are "subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this act provided."

In order to find what is meant by "exempted or excused," we must look back to the earlier provisions of the law, as set forth in section 4, which also gives the machinery and the methods for hearing all exemptions or excuses, as well as the power to hear and determine all questions as to excluding or discharging "persons or class-

es of persons from the selective draft under the provisions of this act, not included within the original jurisdiction of such local boards."

In section 4 the "exemptions" provided for cover officers of the United States, duly ordained ministers, those in the military and naval service, etc. Those who may be "excused" in accordance with the rules and regulations promulgated by the President are county and municipal officials, workers in armories, arsenals, and navy yards, those having dependents, those found to be physically or morally deficient, etc.

The words "exempted or excused" in section 5, however, evidently include also those called under the draft who may be able to show that they are outside of the provisions of section 2, and therefore are not subject to military service, if they establish, in the way provided by the statute, that they are not male citizens or male declarants, between the ages of 21 and 30.

In other words, after a person has registered he is expressly made subject to the military draft law and must serve in the Army until and unless he is exempted or excused by the machinery of the draft law itself. The only exception to this is that stated in the *Angelus* case, where the local or district boards can be shown to have acted outside of the draft law and thus to have no jurisdiction as a basis for their determination.

Under these circumstances, as was held in the cases above cited, it is impossible to hold that a hearing would be unfair, or that a person drafted could avoid the consequences of such hearing by claiming thereafter that he should not have been required to present his claim for exemption or excuse (i. e., exclusion) in the way provided by the statute and by the regulations of the President. A determination by the court that such hearing was "unfair" would be equivalent to a finding that the provisions of Congress and the regulations promulgated by the President were unfair or outside of the law.

Such a holding would be entirely different from those under the immigration law, where executive officials have been held to have exerted power outside of that given them by the statute, as in *U. S. v. Williams*, 200 Fed. 541, 118 C. C. A. 632; *Gegiw v. Uhl*, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114; *U. S. ex rel. Castro v. Williams* (D. C.) 203 Fed. 155.

It is evident that, if a person has registered who was outside of the ages specified, or who failed to claim that he was exempt or that he was not subject to draft, he would nevertheless, if drawn, be inducted into the Army and would be subject to the discipline thereof in all respects, even though thereafter he might change his mind and wish that he had claimed exemption, exclusion, or freedom from all liability to the exercise of jurisdiction under the law.

A determination by the local or district boards is final, if the question has been properly raised and decided against the individual, and the law evidently makes final a similar determination, where the question has not been properly raised by the individual himself. The reason for any such failure to present the question furnishes no basis for directing release of the individual, under a writ of habeas

corpus or a writ of certiorari, if the hearing has been fair; that is, if it has been conducted in accordance with the provisions of the statute and the regulations promulgated therefor.

The present case furnishes no evidence of an unfair or extra-jurisdictional determination of the question of liability to draft. The writ will be dismissed and the relator remanded.

10. ANGELUS v. SULLIVAN et al.

(Circuit Court of Appeals of the United States, Second Circuit, 1917. 246 Fed. 54, 158 C. C. A. 280.)

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. This suit was instituted for the purpose of securing a review in the courts of the action taken by the local and district exemption boards created under an act of the Congress of the United States known as the Conscription Act, approved May 18, 1917. 40 Stat. 76.

The complainant alleges that he is a subject of Austria-Hungary, and that he arrived in the United States on November 10, 1913. He avers that neither he nor his father at any time made declaration of intention to become a citizen of the United States, and that he is therefore an alien who has not declared his intention to become a citizen. He charges that as such he is not subject to conscription under the provisions of the Conscription Act, which provides that aliens who have not declared their intention to become citizens are not subject to the draft provided for in the said act. He avers that he filed an affidavit in due form, claiming exemption from military service by reason of the fact of his being an alien who had made no declaration of his intention to become a citizen, and that the defendants, who constitute local board No. 155 of the city of New York, which division has jurisdiction over the district in which he resides, denied his application for exemption; and that upon appeal to the district board of the city of New York, which is the local board having jurisdiction of appeals from local board No. 155, the finding of the local board was affirmed. He has accordingly been certified and ordered to report for military service. He asks an injunction enjoining the defendants, and all persons claiming to act in their authority, direction, or control, from certifying his name to the military authorities for military service, and that the defendants be directed to grant him the exemption from military service to which he is entitled under the act, and to strike his name from the list of persons certified to as subject to military service. An order was granted by a judge of the District Court directing the defendants to show cause why they should not be enjoined and restrained pendente lite. Upon the return of the order to show cause, a special appearance was filed for the defendants, and motion was made to dismiss the proceedings for lack of jurisdiction. The motion was granted. In granting the motion the District Judge said:

"I think Congress had no intention that the courts should interfere with this drafting proposition. It is a military measure in time of war, and it would be most subversive of military control and the

proper disposition of this extremely difficult new problem if the courts should interfere in this situation. If Congress had intended that the courts should review the action of the local and district boards it would have so provided, and, unless an appellate court says to the contrary, I am of the opinion that a District Court of the United States should resolve any doubt in favor of the government; any other view might tend seriously to embarrass the work of raising an army, with its manifold difficulties and its tremendous detail. If those who believe they are entitled to exemption were able to apply to the courts, it would be a most disturbing situation and directly contrary to my understanding of the intent of Congress. Congress intended this to be an executive measure, to be carried out by the executive branch of the government, without interference of the courts."

The appeal is taken from this order, and the complainant claims not only that the Conscription Act is unconstitutional, but that the District Court has jurisdiction to grant the relief asked for in the complaint.

1. This court has no doubt as to the constitutionality of the act of Congress. The Constitution, art. 1, § 8, expressly provides that the Congress shall have power to raise and support armies, and to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces. The purpose of the Conscription Act is to raise an army, and the right to raise it does not involve the exercise of an implied power, but of one expressly granted. How can the courts deny to Congress a right which the Constitution in plain and distinct terms confers upon it?

The Constitution, in conferring the power upon Congress, has not prescribed the mode in which the power shall be exercised. The power is conferred fully, completely, and unconditionally. It is for the Congress to determine the means by which the army shall be raised. It is left to its judgment whether it shall be raised by calling for volunteers, or whether it shall be raised by conscription. At the time the Constitution was adopted conscription was not an unknown mode of raising armies, but had been resorted to by governments throughout the world. * * *

The Thirteenth Amendment to the Constitution did not restrict the power granted to Congress in the first article to which allusion has already been made. The amendment provides that "neither slavery nor involuntary servitude, except as punishment for crime, whereof the parties shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

The clear purpose of this amendment was to abolish slavery and to make peonage impossible. In discussing in the *Slaughter House Cases*, 16 Wall. 36, 72 (21 L. Ed. 394) (1872), the Thirteenth and Fourteenth Amendments, Mr. Justice Miller said:

"But what we do say, and what we wish to be understood, is that, in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Con-

stitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it."

The Supreme Court in a recent case—*Butler v. Perry*, 240 U. S. 328, 36 Sup. Ct. 258, 60 L. Ed. 672 (1916)—sustained the validity of a state law which required every able-bodied male person over the age of 21 years and under the age of 45 years, who had resided in a county within the state for 30 days or more, to work on the roads and bridges of the county for 6 days, of not less than 10 hours each, in each year when summoned to do so. The act provided also that a person might render the required services by a substitute, or in lieu thereof pay the road overseer a certain sum to be turned into the county treasury. It was claimed that the act violated the Thirteenth Amendment, as it imposed involuntary servitude. The court, speaking through Mr. Justice McReynolds, declared that the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery, which in practical operation would tend to produce like undesirable results. "It introduced," he said, "no novel doctrine with respect to services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the state, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers." * * *

2. Assuming then that the Conscription Act is not unconstitutional, we come to inquire whether the District Court was in error when it dismissed the complainant's bill. The District Judge dismissed the bill because in his opinion the act of Congress left the decision of the question of exemption to the final decision of a special tribunal created for the purpose.

The act, after authorizing the President to draft men into military service of the United States and exempting from such draft certain classes, gives him authority to create throughout the several states and territories and the District of Columbia local boards. It provides in section 4 that "such boards shall have power within their respective jurisdictions to hear and determine, subject to review as hereinafter provided, all questions of exemption under this act." It also confers authority on the President to create district boards in each federal judicial district, and then provides as follows:

"Such district boards shall review on appeal and affirm, modify, or reverse any decision of any local board having jurisdiction in the area in which any such district board has jurisdiction under the rules and regulations prescribed by the President. Such district boards shall have exclusive original jurisdiction within their respective areas to hear and determine all questions or claims for including or excluding or discharging persons or classes of persons from the selective draft, under the provisions of this act, not included within the original jurisdiction of such local boards.

"The decisions of such boards shall be final except that, in accordance with such rules and regulations as the President may prescribe, he may affirm, modify or reverse any such decision."

But it is said that the act is unconstitutional, in that it deprives the

complainant of his liberty without due process of law, contrary to the Fifth Amendment of the Constitution, which declares that no person shall be deprived of life or property without due process of law. The Supreme Court has, however, held that a judicial trial does not prevail in every case. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 280, 15 L. Ed. 372 (1855). And in *U. S. v. Ju Toy*, 198 U. S. 253, 263, 25 Sup. Ct. 644, 646 (49 L. Ed. 1040) (1905), the court, speaking through Mr. Justice Holmes respecting the Chinese Exclusion Act (Act Sept. 13, 1888, c. 1015, 25 Stat. 476 [Comp. St. 1916, §§ 4306, 4314]), under which the decision of the Department of Labor is final as to the exclusion, said: "If, for the purpose of argument, we assume that the Fifth Amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of the opinion that with regard to him due process of law does not require a judicial trial." That the decision of the question whether a person of Chinese descent was born in the United States, and therefore entitled to enter the country, or whether he was born in China and under the Exclusion Act not entitled to enter, may be intrusted to an executive officer whose decision is final, and that it is due process of law is established law. We see no reason why the same doctrine is not equally applicable to the case in hand. And we therefore hold that the complainant is not deprived of due process of law by being compelled to submit to the final decision of the local and district boards the question whether he is a subject of Austria-Hungary and whether he has not declared his intention to become a citizen of the United States.

The President in the exercise of the authority conferred on him has prescribed the rules and regulations for the local and district boards, and they were announced by the Secretary of War on June 30, 1917. And section 41 of the rules and regulations so prescribed is as follows:

"In the case of a claim of appeal filed by or in respect of any person from the final decision of a local board within the jurisdiction of such district board, the district board shall, if the name of such person is on the list certified to such district board by a local board within its jurisdiction as a person called and not exempted or discharged, examine and consider the claim, affidavits and record in respect of such person filed with such district board by the local board.

"The district board may receive additional evidence in support of or in opposition to any such claim, provided such additional evidence is filed in the form of affidavits within five days after the receipt by such district board of the notice of filing a claim of appeal by or in respect of such person. Within five days after the closing of proofs in any such case, the district board shall decide in favor of or against any such claim, and shall affirm, modify, or reverse the decision of the local board. The decision of the district board shall be final.

"The district board shall thereupon notify, on a form provided by the Provost Marshal General for that purpose, the person by whom or in respect of whom such claim of appeal was filed that the district

board has affirmed, modified, or reversed, as the case may be, the decision of the local board. If the decision of the local board is affirmed, such person shall stand as called for military service to be finally accepted as hereinafter provided."

It thus appears that the complainant seeks to have the District Court set aside a decision on his exemption claim which the act and the rules and regulations of the President declare to be final.

The complainant's right of exemption is based on the provisions of section 2 of the Conscription Act, which, provides that "such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive, and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this act"; and on section 18 of the rules and regulations prescribed by the President, which enumerates the persons or classes of persons to be exempted by a local board. Among others it exempts any person who is a subject of Germany, whether such person has or has not declared his intention to become a citizen of the United States. It then exempts "any person who is a resident alien: that is, a citizen or subject of any foreign state or nation other than Germany who shall not have declared his intention to become a citizen of the United States."

It also provides that "the claim to be exempted must be made by such person, or by some other person in respect of him, on a form prepared by the Provost Marshal General, and furnished by the local boards for that purpose." Such claims must be filed with the local board which notified such person that he is called for service on or before the seventh day after the mailing by the local board of the notice required to be given such person of his having been called for service. The statement on the registration card of any such person that exemption is claimed shall not be construed or considered as the presentation of a claim for exemption.

If the complainant is, as he alleges, a subject of Austria-Hungary, and has never declared his intention to become a citizen of the United States, as he also alleges, it is perfectly clear that he is not subject to the draft. Whether his allegations in this respect are true must, however, be determined in the manner prescribed by the act.

It appears from the allegations of the complaint that the complainant filed an affidavit claiming exemption by reason of the fact that he was an alien, and that the local board denied his application, and that he appealed to the district board, which affirmed the local board. It thus appears that the complainant was heard, and it is nowhere alleged that he was denied a full hearing or that the board rejected or refused to consider any evidence that he was entitled to present. In the absence of such a showing, we have no doubt that the decision of the board is final and cannot be interfered with by the courts.

3. We do not, however, agree with the statement of the District Judge heretofore quoted, that there can be no interference of the courts in the action of these boards. We think a decision of the boards is final only where the board has proceeded in due form, and

where the party involved is given a fair opportunity to be heard and to present his evidence. But if an opportunity to be heard should be denied, there can be no doubt as to the right of the aggrieved party to come into the courts for the protection of his rights. And we do not believe that the District Judge meant to say that a decision must be regarded as final under such circumstances.

The law courts have a general superintending control by certiorari over all inferior tribunals acting in a judicial or quasi judicial character. And jurisdiction is not entirely taken away by the words of a statute which declares that the judgment of the inferior tribunal shall be final.

In *Rex v. Moreley*, 2 Burr. 1014 (1760), the statute provided "that no other court whatsoever shall intermeddle with any cause of appeal upon this act; but they shall be finally determined in the quarter-sessions only." An application was made to the King's Bench, Lord Mansfield presiding, for a writ of certiorari to remove several orders made by a justice of the peace, and it was claimed that the writ could not issue because of the language of the statute. But the court was unanimously of the opinion that a certiorari ought to issue, and it was said that "a certiorari does not go to try the merits of the question, but to see whether the limited jurisdictions have exceeded their bounds." "The jurisdiction of this court," it was said, "is not taken away, unless there be express words to take it away; this is a point settled." Citing 11 Co. 64b; 4 Mod. 145; Salk. 45; 2 Hawk. P. C. 211. And see *Lawton v. Commissioners*, 2 Caines (N. Y.) 179 (1804); *Rex v. The Justices*, 3 D. & R. 35 (1823); *State v. Falkinburge*, 15 N. J. Law, 320, 322 (1836).

And if an individual is restrained of his liberty by a decision of an executive officer or board declared final by statute, he may nevertheless be entitled to a writ of habeas corpus upon a proper showing. Thus in *Chin Yow v. United States*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369 (1908), the Supreme Court reversed the court below, and directed a writ of habeas corpus to issue upon an application made by a Chinese person who alleged that he was a citizen of the United States and detained unlawfully under a decision or order made by the commissioner of immigration at the port of San Francisco after a hearing, which decision had been affirmed by the Department of Commerce and Labor. But in that case the petitioner alleged that he had been prevented by the officials of the commissioner from obtaining testimony, and that if he had been given a proper opportunity he could have produced overwhelming evidence that he had been born in the United States and had departed to China on a temporary visit. * * *

There can be no doubt, therefore, that under the Conscription Act, where a board has denied a full and fair hearing to an individual claiming exemption from military service, he might, if restrained of his liberty, sue out a writ of habeas corpus and obtain his liberty.

4. But whatever remedy the complainant may have or not have, there can be no doubt that he is not entitled to the relief he asks in his bill of complaint. It has heretofore been laid down by the text-writers and the courts as beyond the scope of the powers of a court of equity to enforce mere personal rights as distinguished from prop-

erty rights. This, it need not be said, has not been due to the fact that equity regarded rights of property as more sacred than rights of the person. But the reason for it lies in the fact that equity affords no remedy where there is a full and adequate remedy at law, and that the ordinary process of the law courts are fully adequate for the redress of wrongs to the person. * * *

In *Green v. Mills*, 69 Fed. 852, 16 C. C. A. 516, 30 L. R. A. 90 (1895), a case in the Circuit Court of Appeals for the Fourth Circuit, Chief Justice Fuller, sitting as a Circuit Judge and writing the opinion, it was held that a court of equity had no jurisdiction of a bill seeking to enjoin a county supervisor of registration from performing the duties prescribed by the state registration laws, on the ground that such laws were unconstitutional and operated to deprive the plaintiff and others of their right to vote. In the course of his opinion the Chief Justice said:

"It is well settled that a court of chancery is conversant only with matters of property and the maintenance of civil rights. The court has no jurisdiction in matters of a political nature, nor to interfere with the duties of any department of government, unless under special circumstances, and when necessary to the protection of rights of property, nor in matters merely criminal, or merely immoral which do not affect any right of property." * * *

And the rule is that courts of equity do not interfere by injunction for the purpose of controlling the action of public officers constituting inferior quasi judicial tribunals, on matters properly pertaining to their jurisdictions, and that they do not review and correct errors in the proceedings of such officers, the proper remedy, if any, being at law by writ of certiorari. See *High on Injunctions* (4th Ed.) vol. 2, § 1311. * * *

While disagreeing, therefore, with the opinion expressed by the District Judge, that the courts cannot interfere with the action of the boards and holding as we do, that the civil courts can afford relief from orders made by such boards in any case where it is shown that their proceedings have been without or in excess of their jurisdiction, or have been so manifestly unfair as to prevent a fair investigation, or that there has been a manifest abuse of the discretion with which they are invested under the act, we nevertheless approve the conclusion he reached that the bill should be dismissed.

Order affirmed.

WARD, Circuit Judge. I concur in the opinion of the court without expressing any opinion as to the precise jurisdiction of courts of equity over purely personal rights, or any opinion as to whether an unlawful compulsion of a man's labor or services does not concern property as well as personal rights.

11. STATE *ex rel.* CONSTANTI *v.* DARWIN.

(Supreme Court of Washington, 1918. 173 Pac. 29.)

MOUNT, J. This is an application for a writ of mandate to require the fish commissioner of this State to issue to the relator a purse-seine fishing license for the Puget Sound district for the current year.

The facts are conceded as follows: The relator is a native of Austria-Hungary. He came to the United States in May, 1913, and since June of that year has been an actual resident of this State. On the 29th day of December, 1913, he regularly and in the manner required by law declared his intention to become a citizen of the United States. Since the year 1914, and during the years 1915, 1916, and 1917, his regular occupation has been that of a salt-water fisherman, working on fishing appliances in the Puget Sound district under fishing licenses issued by the respondent. He owns property in the city of Tacoma, is a married man, 45 years of age, having four children, two of whom were born in Austria-Hungary and the two youngest were born in this State.

On April 15, 1918, upon application therefor to the United States Food Administration, a fisherman's license was issued to the relator by that administration, authorizing the relator to engage in the business of catching and distributing salt-water fish.

On the 29th day of April, 1918, the relator applied to the respondent, who is the duly qualified and acting fish commissioner of this State, for a purse-seine fishing license for the district of Puget Sound, and tendered the amount required by law to be paid therefor. The application was denied for the reason that the applicant was not a naturalized citizen of the United States, but a citizen of Austria-Hungary, with which country the United States are at war.

This application is resisted by the attorney general, upon behalf of the respondent, upon the grounds that the relator is an alien enemy and therefor is not entitled to maintain this proceeding, and under the law is not entitled to the license from this State. The statute of this State (Rem. Code, secs. 5150-43) provides that—

"No license for taking or catching salmon or other food or shellfish required by this act shall be issued to any person who is not a citizen of the United States of the age of 18 years or over, unless such person has declared his intention to become a citizen and is and has been an actual resident of the State for one year immediately preceding the application for such license. * * *"

It is plain under this provision of the statute that the relator, being an actual resident of the State for more than one year prior to the application, and having declared his intention to become a citizen of the United States, is entitled to the license he seeks unless the fact that this country is at war with Austria-Hungary impels the suspension of the statute in so far as applicants are not citizens of the United States.

On December 7, 1917, the Congress of the United States passed a resolution that a state of war is declared to exist between the United States of America and the imperial royal Austro-Hungarian Govern-

ment. Thereafter, on December 11, 1917, the President, in pursuance of that resolution, and in pursuance of sections 4067, 4068, 4069, and 4070 of the Revised Statutes of the United States (Comp. St. 1916, §§ 7615-7618), relative to natives, citizens, denizens, or subjects of a hostile nation or government, issued a proclamation as follows:

"Now, therefore, I, Woodrow Wilson, President of the United States of America, do hereby proclaim to all whom it may concern that a state of war exists between the United States and the imperial and royal Austro-Hungarian Government; * * *

"And, acting under and by virtue of the authority vested in me by the Constitution of the United States and the aforesaid sections of the Revised Statutes, I do hereby further proclaim and direct that the conduct to be observed on the part of the United States towards all natives, citizens, denizens, or subjects of Austria-Hungary, being males of the age of 14 years and upwards, who shall be within the United States and not actually naturalized, shall be as follows:

"All natives, citizens, denizens, or subjects of Austria-Hungary, being males of 14 years and upwards, who shall be within the United States and not actually naturalized, are enjoined to preserve the peace towards the United States and to refrain from crime against the public safety, and from violating the laws of the United States and of the States and Territories thereof, and to refrain from actual hostility or giving information, aid, or comfort to the enemies of the United States, and to comply strictly with the regulations which are hereby or which may be from time to time promulgated by the President; and so long as they shall conduct themselves in accordance with law, they shall be undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due to all peaceful and law-abiding persons, except so far as restrictions may be necessary for their own protection and for the safety of the United States; and towards such of said persons as conduct themselves in accordance with law, all citizens of the United States are enjoined to preserve the peace and to treat them with all such friendliness as may be compatible with loyalty and allegiance to the United States.

"And all natives, citizens, denizens, or subjects of Austria-Hungary, being males of the age of 14 years and upwards, who shall be within the United States and not actually naturalized, who fail to conduct themselves as so enjoined, in addition to all other penalties prescribed by law, shall be liable to restraint, or to give security, or to remove and depart from the United States in the manner prescribed by sections 4069 and 4070 of the Revised Statutes, and as prescribed in regulations duly promulgated by the President;

"And pursuant to the authority vested in me, I hereby declare and establish the following regulations, which I find necessary in the premises and for the public safety:

"(1) No native, citizen, denizen, or subject of Austria-Hungary, being a male of the age of 14 years and upwards and not actually naturalized, shall depart from the United States until he shall have received such permit as the President shall prescribe, or except under order of a court, judge, or justice, under sections 4069 and 4070 of the Revised Statutes.

"(2) No such person shall land in or enter the United States except under such restrictions and at such places as the President may prescribe.

"(3) Every such person of whom there may be reasonable cause to believe that he is aiding or about to aid the enemy, or who may be at large to the danger of the public peace or safety, or who violates or attempts to violate, or of whom there is reasonable ground to believe that he is about to violate any regulation duly promulgated by the President, or any criminal law of the United States, or of the States or Territories thereof, will be subject to summary arrest by the United States Marshal, or his deputy, or such other officer as the President shall designate, and to confinement in such penitentiary, prison, jail, military camp, or other place of detention as may be directed by the President.

"This proclamation and the regulations herein contained shall extend and apply to all land and water, continental or insular, in any way within the jurisdiction of the United States."

On the next day after this proclamation was issued the Attorney General of the United States, referring to it, said:

"This proclamation differs from the preceding proclamation relating to the subjects of the German Empire in that, while it authorizes the arrest and internment of any subjects of the dual Empire whose conduct may be a menace to the safety of the country, the only restrictions which it contains are prohibitions against either entering or leaving the United States without first obtaining permission.

"Many subjects of Austria-Hungary have already demonstrated their strong loyalty to this country by their faithfulness in industrial work, their organization of recruiting committees, and in service with our armies. For the present, therefore, no restrictions will be placed upon the movements of subjects of Austria-Hungary. They are not subject to the restrictions of the previous proclamations relating to German enemy aliens; they will be permitted to reside and labor in prohibited areas and to travel freely without molestation. Only those who are dangerous or disloyal are subject to arrest."

It seems plain, under this proclamation, that, though the relator may be an alien enemy because he has not been naturalized, yet there is nothing in this proclamation which treats a native of Austria-Hungary as an alien dangerous to the peace and safety of the country. The proclamation declares with reference to such persons that "so long as they shall conduct themselves in accordance with law, they shall be undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due to all peaceful and law-abiding persons, * * *" and that "all citizens of the United States are enjoined to preserve the peace and to treat them with all such friendliness as may be compatible with loyalty and allegiance to the United States."

So it is apparent that this proclamation recognizes such persons as friendly aliens and not as alien enemies. That the legislature may prohibit any but citizens of this State and of the United States from receiving a fishing license within the State, admits of no doubt. It has not done so. That the Federal Government may establish the status

of a subject of an enemy country residing within the United States, also admits of no doubt. It has done so by authorizing the proclamation above quoted. That the Federal Government, or the President of the United States under authority of Congress, may nullify the statute with reference to permitting privileges to aliens who have declared their intention to become citizens of the United States, admits of no doubt. In our opinion, this has not been done. But before the terms of the statute may be nullified or suspended by Congress, or by the President acting under authority of Congress, the intention to do so must be clear. We think such intention is not clear. On the other hand, it seems entirely clear that the proclamation of the President relating to natives of Austria-Hungary, quoted above, intended to preserve the rights of such persons in this country to follow their peaceful pursuits and occupations and to accord them the consideration due to all peaceful and law-abiding persons under the law of their domicile. As confirming this position, the Food Administration, acting under authority of Congress, has issued to this relator, knowing his nationality and his status, a license "to engage in the business of catching and distributing salt water fish, shellfish and crustaceans."

The respondent argues that it was the intention of the legislature, in enacting § 5150-43, Rem. Code, above quoted, to confine the right of fishing in this State to citizens, or to those entitled to become citizens; and that, since § 4362 of the compiled statutes of the United States of 1916, provides: "No alien who is a native citizen or subject, or a denizen of any country, State, or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States"—the relator is not entitled to become a citizen of the United States, and for that reason the respondent was justified in refusing to issue the license. It is true relator is not now entitled to be admitted to citizenship. He declared his intention to become a citizen in December, 1913. The time of residence does not expire until December, 1918. He will then have two years in which to make his final proof and become a naturalized citizen. So it is apparent that the relator may not at this time become a citizen. In due time he may or he may not, as future events develop. We think this point is entirely immaterial, because the statute says a person who has declared his intention to become a citizen and has been a resident of the State for one year immediately preceding his application shall be entitled to such license. The legislature meant what it said in that respect. It made no exceptions, and since the statute has not been suspended or nullified by higher authority it is still in force and must be followed.

We think it clear that the relator is entitled to prosecute this action for the writ. If such persons shall be undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due all peaceful and law-abiding persons, we think it follows that they are authorized to maintain actions to secure to themselves their lawful occupations. (*Fritz Schultz, Jr., Co. v. Raimes & Co.*, 99 Misc. Rep. 626, 164 N. Y. Supp. 454; *Id.*, 100 Misc. Rep. 697, 166 N. Y. Supp. 567; *Speidel v. Barstow Co.* [D. C.] 243 Fed. 621; *Porter v. Freudenberg*, Ann. Cas. 1917C, 215.)

We are of the opinion, therefore, that the relator is entitled to the license and is authorized to maintain the action.

The writ will therefore issue as prayed for.

ELLIS, C. J., FULLERTON, J., PARKER, J., concur.

MACKINTOSH, J. The relator being a subject of a country with which we are at war cannot resort to our courts. As I read it the President's proclamation does no more than preserve to the subjects of Austria-Hungary the privilege of peaceful life and work in this country, and does not attempt to abrogate the rule of law which closes our courts to them during war time. I therefore dissent.

12. MINOTTO v. BRADLEY.

(District Court of the United States, Northern District of Illinois, 1918.
Department of Justice, War Statutes Bulletin No. 105.)

The petition recites that petitioner is an Italian citizen, and is unlawfully held by the United States marshal by virtue of a warrant issued under a presidential proclamation made pursuant to sections 4067, 4068, 4069, and 4070 of the Revised Statutes (Comp. St. 1916, §§ 7615-7618).

The case was heard upon the petition itself, without further evidence. The petition alleged the petitioner to be a citizen or subject of Italy, and set forth the facts upon which this claim was based. The petition showed that petitioner was born in Germany and had lived there for 22 years, and had never lived in Italy. His father had lived in Germany for several years previous to the birth of the petitioner, and his only property and place of actual residence was in Germany. The petition alleged that both father and son were Italian subjects and had been recognized as such by both Germany and Italy.

Petitioner urges that the writ should issue for the following reasons:

1. That petitioner is not an alien enemy within the intent and meaning of the law of the United States and the proclamation of the President.
2. That he never has sworn allegiance and never has owed allegiance to Germany or any nation or country with which the United States is at war.
3. That he has committed no crime against the public safety and violated no law of the United States. That he has not given aid and comfort to the enemy of the United States, and has done no act in violation of any regulation promulgated by the President.
4. That there is no reasonable cause to believe that he has been aiding the enemy, or to believe that he is about to violate any regulation promulgated by the President.
5. That the warrant was issued without any showing of probable cause, supported by oath or affirmation, as required by the fourth amendment to the Constitution.
6. That he was not given any hearing in advance of the issuing of the warrant.
7. That pursuant to said warrant he is to be confined for an indefinite period without a hearing.

8. That he is not an alien enemy, has violated no laws of the United States, and that no truthful evidence has been presented to the President of the United States or to the Attorney General tending to show that the petitioner is an alien enemy, or that there is any reasonable cause to believe that he is aiding or about to aid the enemy.

9. That the confinement of the petitioner is in violation of clause 3, section 2, of Article 3 of the Constitution of the United States, and the fourth, fifth, and sixth amendments of the Constitution.

10. That the direction in the warrant is contrary to the law because under section 4069 of the Revised Statutes it is necessary that a sworn complaint be filed in some court having criminal jurisdiction, or before some judge of a court of the United States, and a full information and hearing had upon such complaint.

11. That the petitioner is a subject of the Kingdom of Italy.

Section 4067 of the Revised Statutes reads as follows:

"Whenever there is declared a war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States, by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of 14 years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject, and in what cases and upon what security their residence shall be permitted; and to provide for the removal of those who, not being permitted to reside in the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety."

Section 12 of the President's proclamation of April 6, 1917, reads as follows:

"An alien enemy whom there may be reasonable cause to believe to be aiding or about to aid the enemy, or who may be at large to the danger of the public peace or safety, or who violates or attempts to violate, or of whom there is reasonable ground to believe that he is about to violate, any regulation duly promulgated by the President, or any criminal law of the United States, or of the States or Territories thereof, will be subject to summary arrest by the United States marshal, or his deputy, or such other officer as the President shall designate, and to confinement in such penitentiary, prison, jail, military camp, or other place of detention as may be directed by the President."

CARPENTER, District Judge. I think I do not care to hear from the attorneys for the Government in this case. As I stated at the outset, the court is not neutral in this war, and any doubt which it may entertain as to the construction of the statutes and proclamations in question must be resolved in favor of the presidential warrant.

Of the eleven reasons assigned here why the writ should issue we

are concerned only, at least at the outset, with reasons one and two. These two assignments seem to dovetail together, and if, under a construction of the act of Congress, a person comes within the definition of an alien enemy, clearly it was within the power of Congress to deal with such alien as it saw fit; and if the law has prescribed how an alien enemy should be dealt with, either by Executive proclamation or through the various administrative agencies of the Government, the petitioner can not complain. The sole question, as I see it, is, Is the petitioner an alien enemy, as defined by Congress.

If the petitioner is not an alien enemy the writ in this case must issue.

It has been urged that the German law and the Italian law determine the status of the petitioner. We must construe the act of Congress according as the phrases and words used are construed in this country, according to our laws. We can not assume that Congress in legislating is using words and phrases as they are used in the civil law or the Code Napoleon, as distinguished from the common law and statute law in this country. Whether, as between Italy and Germany, the petitioner was an Italian or a German is not important here.

The use by Congress of the four words, "native, citizen, subject, and denizen," indicates that each one of the words was to have a significant and different meaning. Counsel for petitioner admit that the words "subject" and "citizen" are broad enough to include the native German, born of German parents. It would appear, therefore, that the word "native" must have been used to define something else. As I said, by way of illustration, to Mr. Godman (attorney for the petitioner), the native-born German who moves to Switzerland and becomes naturalized is neither a subject nor a citizen of Germany. He is a native, however, of Germany and would be so considered by any one. Indeed, a person born in Illinois, a citizen of the United States, is none the less a native of Illinois.

Counsel argues that to be a "native" one must not only be born in a country but owe loyalty and allegiance to that country. Allegiance is not born in the child of alien parents. Allegiance may well determine one's political status. Allegiance by birth and the place of birth may be two entirely different things. The derivation of the word "native" indicates the place of birth; a man's native town is the town where he was born; a man's native State, be it Württemberg or Massachusetts, is the State where he was born. He may be a citizen of a confederation of states, but his nativity is determined by the place of his birth. One born of foreign parents in this country owes perhaps a double allegiance; to a foreign nation because of his parents, and to this because of his birth. When, however, he becomes of age he can elect which country shall have his sole allegiance. He is a native at all events of the United States.

This statute must be construed, as I stated during the argument, with the end which Congress had in view. We all appreciate the seriousness of the situation. We realize that a mistake once made can not be remedied. The determination by the President whether the facts justify the internment of the petitioner, provided he is an alien enemy, is not to be investigated by the courts. The courts, in the

nature of things, are precluded from discussing those facts. If the President were required to disclose the basis for his warrant the entire purpose of the statute might be frustrated. The only question to be settled here is whether, under the construction of this statute, the petitioner is a "native, citizen, denizen, or subject" of a power with which we are at war. The petitioner could no more cease being a native of the place of his birth than I could cease being a native of the State of Illinois, when you are considering the place of birth.

Look at the history of this case. The petitioner was born in Germany. His mother was born in Germany. His father was born in Austria. The residence of the family was in Germany until within a very short time before the petitioner came to this country. The record shows that the family of the petitioner has no property in Italy, and have never lived there for any length of time.

Under these circumstances it seems to me the court is not stretching the construction of this statute by holding that this is just the kind of a case that Congress intended to reach when it used the word "native." All the sympathies of one who was born in Germany, and who has lived there for 22 or 23 years may be said to be with Germany. Whether they are or not in this case is not important. Suffice it to say that the language used by Congress apparently meets such a case.

It might be easy to find in this country thousands of men who were born in Germany and lived there for 25, 30, or 35 years, saturated with German institutions, all of their sympathies might lie with Germany, yet, if the argument for the petitioner is right, the President is helpless, and nothing can be done with them in this country at this time.

If a friendly ally of this country is offended by the action of the President, because some one tracing his lineage back to Italy, but born in Germany, was apprehended under the President's warrant, I have no doubt the matter will be brought to the attention of the State Department and diplomatically adjusted.

Inasmuch as Congress has the right at all times to legislate for aliens, clearly it has the right to legislate for alien enemies, and there can be no question here of violating the provisions of our Constitution. The claim that the petitioner is deprived of his liberty without due process of law has no place in the argument in this case. It is like the ordinary case of deportation. Congress confers upon an administrative body certain rights; it is told to do certain things; it determines the facts; it reports that the facts have been so determined. That is all there is to it. The alien has a right to have the courts of this country say whether or not he has been dealt with according to the law, according to the statute enacted by Congress. That having been done, he can not get any additional rights by claiming that the Constitution, which gives him certain rights in our courts to sue and be sued and to enjoy the protection of our police regulations, gives to our citizens greater rights.

Section 4069, after referring to the presidential proclamation, requires the presentation of a sworn complaint to some court or some judge, and this procedure is made mandatory by this section of the Revised Statutes, which authorizes the several courts of the United

States having criminal jurisdiction, after complaint and hearing, to cause alien enemies to be apprehended, confined, or removed. This section does not in any way limit the powers of the President, but furnishes an additional means to bring about the same result. If the information comes in the first instance to the President or his administrative officers, he may act. Section 4069 permits an information to be filed by any individual who believes that the law has been violated; and, as I have said before, the disclosure, by way of complaint or information, of the facts upon which the alien is apprehended might in many instances destroy the effectiveness of the law. In this position I am supported by an able decision in a late case by the District Court in the Northern District of Alabama.

It is clear to me that having given the President summary power, Congress never intended to take that away by authorizing complaints to be filed in the courts.

To summarize: As I view the situation the sole question to be determined is whether, under section 4067 of the Revised Statutes, the petitioner comes within the description, "natives, citizens, denizens, or subjects" of an hostile nation. I believe that he does, and that therefore the President had a right to issue the warrant.

The application for the writ of habeas corpus must, therefore, be denied.

13. UNITED STATES *ex rel.* KOTZEN *v.* LOCAL EXEMPTION BOARD NO. 157, FOR CITY OF NEW YORK.

(District Court of the United States, Southern District of New York, 1918. Department of Justice, War Statutes Bulletin No. 124.)

Knox, District Judge. In this case Max Kotzen, the relator, obtained a writ of habeas corpus for the purpose of being discharged from the military service of the United States, into which he had been inducted by local exemption board 157 of the city of New York. The relator, being within the draft age, claimed upon his questionnaire to have been born in Russia on October 31, 1890, and to have come to this country in 1893 (approximately 25 years ago). At the time of his arrival he was accompanied by his mother. Nothing is said in the questionnaire as to his father, save that he answered "No" to question 8, series 7—namely, "Has either of your parents been naturalized in the United States?" The relator likewise denied that he had ever voted in the United States, or that he had declared his intention to become a citizen of the United States. In answer to other questions the registrant declared that he did not want to fight for the United States or for his native country.

Manifestly, if the statements of the registrant that he is a non-declarant alien are true, he should, under subdivision F of rule 12, section 79 of the Rules and Regulations of the Selective Service Act, have been placed in Class V-F. The local exemption board, however, placed the registrant in Class I-A, summoned him for service, and duly inducted him into the military service of the United States.

The question, therefore, for determination, is whether the regis-

trant was properly classified, and if he was not, his writ should be sustained. In order to arrive at the answer to the question now before the Court, it is necessary to consider other sections of the Rules and Regulations governing the operation of the Selective Service Act, together with what was done subsequent to the filing of the relator's questionnaire.

Among other things, section 100 provides:

"If, upon examination, the local board finds that a questionnaire does not contain the information required or contains substantial or material errors which indicate ignorance or lack of knowledge on the part of the registrant, or in case the local board shall desire further information, the board shall require the registrant to appear at a day to be fixed and complete the questionnaire or correct any substantial or material error which may appear therein, or to furnish such other evidence as the board may require. Failure on the part of the registrant to appear on or before the day set by the local board shall remove the right of the registrant to correct, modify, or add to his questionnaire."

Under section 101 of the Rules and Regulations relating to the process governing the classification by local boards, there appears a note, part of which reads:

"Local boards are especially enjoined to scrutinize carefully any claim for exemption of a registrant on the ground of alienage, and, before classifying an alleged alien in Class V, to satisfy themselves beyond reasonable doubt that the registrant claiming such exemption is not a citizen of the United States and has not declared his intention to become a citizen."

It appears in the case before me that the board was not satisfied with the claim of alienage put forth by the registrant, inasmuch as some time prior to February 6, 1918, the local board directed a paper, in the nature of a subpoena, to be issued to the registrant, the purport of this paper being:

"You are hereby commanded to appear as a witness before the above-named board on the 6th day of February, 1918, at 3 o'clock p. m., for the purpose of testifying in the matter of the claim for exemption or deferred classification, and not depart without leave of the board."

The registrant received this subpoena, and, in response thereto, went before the board where he was questioned. A pencil memorandum was taken as to what transpired upon this occasion. That memorandum reads as follows:

"Is here 24 years. Was 3 years old when he arrived. Father here 25 years. Attended public school here. Does not know whether his father is a citizen. Never was with him all the time. Has no personal knowledge."

Thereafter the board decided against the claim of the registrant and placed him, as set forth above, in Class I-A. Upon learning of his classification the relator, upon February 11, 1918, took an appeal to the district board, and the local board sent to the district board a memorandum setting forth substantially the result of Kotzen's examination, with this addition:

"Registrant did not know whether his father was a citizen, and the members of the board being of the opinion that his proof of alienage was insufficient, the claim was unanimously denied."

The district board likewise unanimously classified the registrant in Class I-A, because it found that the alienage of the registrant was not proved to the satisfaction of the local board.

About March 16 Kotzen took up with the attorney for the provost marshal general the matter of reopening his case, submitting a certificate of the Russian consul general at New York, which is to the effect that Kotzen had submitted to that officer certain declarations, from which it appears that he is a native and citizen of Russia. He also submitted the affidavit of a man named Sam B. Klitzner, in which Klitzner says from his own knowledge that he knows Kotzen is not a citizen of the United States; that he (Klitzner) had asked him to become a citizen, and that Kotzen had declined to do so. An affidavit was also submitted from another man, named Harris Brodofsky, who says that he knows that Kotzen is of Russian birth and never became a citizen of the United States, and that the affiant has discussed with Kotzen the possibility of making an application to become a citizen. Julius Kotzen, the father of Max Kotzen, also makes an affidavit, in which he says he came to this country with the registrant about the year 1895, and that he knows of his own knowledge that Max Kotzen has never declared his intention to become a citizen of the United States, and that he (the father) is not a citizen of the United States.

The attorney for the provost marshal general forwarded these documents to the local board without any recommendation as to the consideration to be given them. Written upon the letter of the attorney in lead pencil are the words, "Application denied, 3-19-18," which notation is followed by the initials, "N. G.," which are the initials of Nathan Gordon, the chairman of the exemption board.

Upon this state of facts I was, upon the argument, inclined to believe that the relator was entitled to have his writ of habeas corpus sustained. I have since changed my mind and have concluded that his writ must be dismissed. I base this decision upon the ground that the burden of establishing the relator's alienage rested upon him; that in view of his long residence in the United States, the tender age at which he came here, the absence of any proof as to whether or not his father had become a citizen, or if his father had died, whether or not his mother had remarried a citizen of the United States prior to the majority of the relator, made it perfectly proper for the board to decline to be satisfied with the mere declaration, even though it was a sworn declaration, of the relator, that he was not a citizen of the United States, or was not a declarant.

It seems to me that the note which follows section 101 of the rules and regulations governing the operation of the selective service act establishes the degree of proof that is necessary in order for a registrant to obtain exemption—namely, that the board shall be satisfied of his assertions beyond a reasonable doubt. I am also of the opinion that when Kotzen was called before the board for the purpose of testifying in the matter of his claim for exemption, that was in effect

a notice to him that the issue of his claim of exemption was to be tried, and thereby a notice to him to present all the evidence he possessed as to the facts claimed by him. It would follow that his failure to produce proof which would convince the board beyond a reasonable doubt of his alienage, justified the board in declining his request to be classified in Class V. I have been of the opinion that perhaps it was the duty of the board to advise him that he was required to furnish further evidence if it was not satisfied with the testimony of Kotzen. However, I do not now hold to this view.

As to the duty of the board to reopen the case, I hold it was in the sound discretion of the board whether or not it should be reopened. In the very nature of the operation of the local boards, guided by the provisions of the selective service act and its rules and regulations, it is necessary that they should have wide range of discretion, unless the work of these boards is to be seriously interfered with. It may be said that the board should have been satisfied with the proof of the relator, but I am of the opinion that it is not the province of this court to pass judgment upon what constituted sufficient evidence to satisfy the board of the alienage of this registrant. In other words, I am not prepared to say that the board here acted in such an arbitrary manner and with so little regard for its duties as to justify me in reaching the conclusion that its whole action is tainted with illegality.

The writ is dismissed.

14. UNITED STATES v. NEARING.

(District Court of the United States, Southern District of New York, 1918.
252 Fed. 223.)

Demurrer by both defendants to two indictments, the first found on March 21, 1918, and the second on May 13, 1918.

The first indictment is in four counts. The first count alleges that the two defendants, of whom one is a New York corporation, conspired with certain unknown persons to violate section 3 of the Espionage Act (40 Stat. 219) while the United States was at war with Germany, i. e., to cause insubordination, disloyalty, mutiny, and refusal of duty on the part of the military and naval forces of the United States, by means of a pamphlet entitled "The Great Madness," and by means of its distribution throughout the United States to persons unknown to the grand jury, but who are described as "in part belonging to the military and naval forces of the United States and in other part liable to service therein." The said pamphlet contained "statements and arguments calculated and intended to create and promote insubordination, disloyalty, mutiny, and refusal of duty" among persons belonging to the military and naval forces of the United States and among those liable to service therein. Various overt acts are alleged which need not be stated.

The second count is of the same character, except that it alleges a conspiracy to obstruct the recruiting and enlistment service of the United States by means of the same publication, and further alleges

that the pamphlet contains statements and arguments "calculated and intended to embarrass, obstruct, and interfere with the administration" of the selective-service act, "and to induce persons available and eligible for enlistment and recruiting in the military forces to fail and refuse to enlist for service."

The third count alleges that Scott Nearing wrote the pamphlet in question and the American Socialist Society printed and published it and offered it for sale. The count is for attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States.

The fourth count is the same, except that it is for "willfully attempting to obstruct the recruiting and enlistment service of the United States." * * *

The pamphlet in question undertakes to show that America's entrance into the war was the result of capitalist intrigue. The "plutocracy," as it is called, finding its hold upon the political and economic life of the Nation endangered by changes in public opinion, seized upon the instinctive martial responsiveness of the people to rehabilitate its falling power. There was no cause at issue which could in the least concern the interests of the people; they were tricked and cajoled into the most destructive of all wars by a stealthy and dishonest propaganda which played upon their primitive sense of tribal gregariousness and involved them in a conflict whose issues would only serve to fasten more securely upon them the domination of the capitalist classes. That class, in pursuance of this design and through the fear of "labor solidarity," with its accompanying shortage of cheap labor, secured conscription. It was a device which at once struck at the power of organized workmen and offered a means for the economic exploitation of Central and South America. It fastened upon America that militarism which the capitalists who contrived the war affected to condemn. It was a victory for "plutocracy" which was at once reflected in the acclaim of the venal press, and the increase in value of their bonds and stocks. The political measures which the author recommends as remedies do not involve any disobedience to existing law; they consist of political agitation by discussion and in the press, the "capture" of the schools, "industrial and political solidarity," the elimination of all profit from industry, "equal opportunity and justice for all."

A complete analysis of the whole pamphlet, which consists of 44 pages, would be too extended to set out in detail, but the substance is as given. The manner and diction is intolerant and violent, after the common tradition in revolutionary propaganda. It is obviously inflammatory to the feelings of such readers as believe themselves unjustly treated by the existing order which it presents as unqualifiedly noxious to the body politic and proper only for immediate destruction.

The defendant's argument upon this branch of the case is substantially as follows: The pamphlet does not cross the line of political agitation; there is no suggestion, direct or indirect, that any means shall be employed in violation of existing law. On the contrary, the recommendations of the author can only be read to include

recognized political means. The only possible effect which can fall within the statute is that some readers, subject to the draft or already in the military service, may be stimulated to evade or disregard their obligations. This is a possible result of any political agitation, since many will not distinguish between the mischief of the existing order and the fact that it is supported by law. To prosecute those whose propaganda is directed toward the repeal of such an order involves a perpetuation of that order, whether right or wrong, since it chokes the opportunity for any expression or opinion that might in the end change it. Whatever the war powers of Congress in the suppression of public discussion, at least they must be explicitly exercised. It is contrary to every canon of statutory construction to extend the scope of a statute only prohibiting incitement to mutiny and obstruction of the recruiting and enlistment service so as to include the indirect effects of a public discussion, in itself quite lawful.

LEARNED HAND, District Judge. The two first counts of both indictments allege a conspiracy to cause insubordination in the Army and to obstruct the enlistment service by the publication of the pamphlet above described. We are to suppose that the conspiracy contemplated and intended that the pamphlet should be circulated among present or future members of the Army, and persons subject to the draft and to voluntary enlistment, and that the pamphlet was chosen as a means apt to cause the first to become insubordinate and the second to evade the draft or refuse enlistment. If the conspiracy had been successful these results would have followed. * * * For the present I shall assume that in both clauses the question is what words make their utterer responsible for results which in the course of nature, including the wills of others, may be expected to follow from them.

That the author of words may in fact be the cause of the commission of crime by others is a trite enough observation. Any discussion of existing laws designed to show that they are mistaken in means or unjust in policy may have that result. Everyone knows that the obligation of law in the minds of many men depends altogether upon their approval of its purposes, and that to arouse their disapproval is to terminate their obedience. Indeed, there are few whose allegiance to any given law is not modified by their opinion of its justice and the measure of whose obedience does not turn in some degree upon that factor.

At common law the utterer of written or spoken words is not criminally liable merely because he knows they will reach those who will find in them the cue for criminal acts. On the contrary, the rule has always been that to establish criminal responsibility the words uttered must amount to counsel or advice or command to commit the forbidden acts, and this is the classic form of expression (4 Blackstone, 36, 37). Of course the counsel or advice need not be explicit, since the meaning of words comprises what their hearers understand them to convey. Yet the terms, "counsel or advice" have a content which can be determined objectively and do not depend upon the subjective intent of their author. I tried unsuccessfully

in *Masses Pub. Co. v. Patten* [D. C.] 244 Fed. 535, to suggest an analysis of what is included in those terms and shall not attempt it again. It is enough here merely to suggest that they must have limits determined by the character of the words themselves. That there may be language—as, for instance, Marc Antony's funeral oration—which can, in fact, counsel violence while it even expressly dis-countenances it, is true enough, but that raises only the situation, familiar enough everywhere in the law and already mentioned, of the actual meaning of words to their hearers.

Now, there is nothing in the pamphlet in question which can, as I read it, be understood to constitute any counsel or advice or command to obstruct the draft or to become insubordinate. At least, if it be the pleader's purpose to allege that they reached persons who so understood them, and that the defendants knew of this likelihood, that must be especially alleged. Taken with any interpretation which they can fairly bear, they remain entirely within the range of discussion, and at common law would not, I think, subject their author to criminal responsibility for the results, no matter what his intent.

Whatever may be the rule at common law, I understand *Masses Pub. Co. v. Patten*, 246 Fed. 24, 158 C. C. A. 250, L. R. A. 1918C, 79, Ann. Cas. 1918B, 999, to lay down an added measure of criminal liability under this statute to the utterance of words which may cause insubordination or may obstruct the enlistment service. In that case, it is true, there is language which, taken broadly, can be made to mean that the author is liable if he merely knows that his words will so result. This I can hardly think can have been the significance of the decision, since, as I have already shown, the inevitable consequence would be to imperil any discussion of public matters. It certainly was not the purpose of that case to do so, or indeed to insist that the style or manner of the discussion must measure with any standard of taste or temperance. Such a result would be foreign to the whole history of the subject. The test as laid down in that case was, I think, this: That though in the form of public discussion, words which might not themselves amount to advice or counsel to violate the law would nevertheless make their author criminally responsible if they were in fact the cause of the results forbidden and if they were uttered with the specific intent of producing those results. In short, the test was made not objective only but in part subjective, as is indeed often the case in the definition of crime. At least this is as I understand the case, and it is in this sense that the rule was applied in the trial of the first indictment against the *Masses Publishing Co.*, which was the direct result of the decision of the circuit court of appeals.

Now, in the first two counts of each indictment the defendants are alleged to have intended by the words used to cause insubordination and to obstruct the enlistment service. It is certainly true, and can hardly be denied, that the pamphlet might be an efficient argument and so a cause in the minds of men to secure that result. Such utterances and such a manner would produce a state of mind prone to insubordination and to evasion. Thus both conditions are

fulfilled which are required, not to be sure under the common-law rules in such matters, but in the decision mentioned.

Similarly of the third and fourth counts of the second indictment. The third is for attempting to cause insubordination by publishing the pamphlet with the requisite intent. A conspiracy is indeed hardly less than a joint attempt, at least if the overt acts are considered as a part of the crime. The fourth count is somewhat different, since it alleges the substantive crime of obstructing enlistment. If for that crime success was necessary, or indeed any results upon enlistment, the indictment would be insufficient, but I think it is not. The statute obviously forbids the effort, not the result. One obstructs when one hinders or impedes, and it is no answer that the obstruction is successfully passed over. If words are enough, and they surely are, under this clause nobody would hesitate to say, I think, that a man who went about persuading others not to enlist or to evade the draft was obstructing the draft, though he did not succeed in a single case. In any event this was specifically held by the Circuit Court of Appeals in *Masses Pub. Co. v. Patten*, *supra*.

It follows, however, from the foregoing discussion that the third and fourth counts of the first indictment are bad for omission to allege the requisite specific intent. * * *

Further, the defendants insist that "obstructing the recruiting and enlistment service" does not include the draft in any event, and as to voluntary enlistment that it includes only the officers charged with the duty of recruiting and enlisting. The question whether the word "enlistment" covers drafted men is certainly not free from doubt. The Oxford Dictionary defines "enlist" as "to enroll on the list of a military body; to engage as a soldier," apparently including both voluntary and involuntary enrollment. In *Babbitt v. U. S.*, 16 Ct. Cl. 202, 213, it was said to apply only to voluntary enlistment, but the contrary was ruled in *Sheffield v. Otis*, 107 Mass. 282, and Bouvier's Law Dictionary defines it inclusively of any form of listing. In *Tyler v. Pomeroy*, 8 Allen [90 Mass.] 480, there is a long historical discussion not directly touching the question, but showing how the term was used in England, where there was no conscription. However it may be, I think that the question is not raised here, because the pamphlet obstructs the voluntary enlistment service, always assuming the existence of the rule in *Masses Pub. Co. v. Patten*, *supra*. Even if I were to accept the limited construction of the defendants, that that "service" includes only those officials concerned with voluntary enlistment, the same result would follow. These officials stimulate voluntary enlistment by advertisement, publicity, and every imaginable device. To persuade or advise or counsel eligible persons not to volunteer certainly obstructs the purposes of that service, whether the effort be successful or not. This is at least one of the evils at which the statute aims. It means to prevent the undoing of the work of the "service;" perhaps it means more.

It will perhaps be asked if this includes all bona fide advice to an eligible not to volunteer, as for example by a wife or a father, on the score of duty. Obviously not. If an eligible asks advice of anyone, or if a gratuitous adviser has an interest or duty to give

advice, the law does not forbid him. But the statute does not recognize it as a duty imposed upon every citizen, no matter how strong his convictions may be, gratuitously to intervene in the decision of its citizens. The purpose is good in the view of the statute, and such tolerance as it allows to those who do not think it good does not extend to spontaneous persuasion of those who are eligible. So far the statute enforces its decision regardless of difference of opinion among its citizens; they must not meddle because they do not agree.

The statute, therefore, would in any event extend to advice or counsel which had not the excuse of interest or a recognized duty, but under the rule in *Masses Pub. Co. v. Patten*, supra, it must be held to go further, and to include also the utterances of words which do not advise or counsel but which are apt to dissuade eligibles and are uttered with that specific intent. Hence the counts for obstruction are good, no matter how "enlistment" be understood. * * *

I conclude, therefore, that the demurrers to the first and second counts of the first indictment must be overruled and to the third and fourth sustained. The demurrers to the second indictment must be overruled.

Demurrer overruled.

15. UNITED STATES v. PRIETH.

(District Court of the United States, District of New Jersey, 1918. 251 Fed. 946.)

HAIGHT, District Judge. The indictment to which the defendants have demurred is based on section 4, title 1, of the so-called Espionage Act of June 15, 1917 (40 Stat. 217), and charges a conspiracy to commit the third specific crime set forth in section 3, title 1, of that act before it was amended by the act of May 16, 1918. It contains but one count, and alleges, in substance, that subsequent to June 15, 1917, the defendants conspired "unlawfully and willfully to obstruct the recruiting and enlistment service of the United States to the injury of the service and of the United States through and by means of the printing and publishing at Newark, and the circulating and distributing at Newark aforesaid and elsewhere throughout the United States, among persons who were then and there persons available and eligible for enlistment and recruiting in the military forces of the United States, as well as persons who then and there were liable to be taken into the service of the United States under the provisions of an act of Congress entitled [then follows a description of the Selective Service Act of May 18, 1917], a certain newspaper or publication called and known as the New Jersey Freie Zeitung, containing headlines and editorials and printed matter calculated and intended by the said defendants to induce said persons available and eligible for enlistment and recruiting in said military forces to fail and refuse to enlist for service therein, and to induce persons liable to military service pursuant to said act of Congress approved May 18, 1917, to refuse to submit to registration

and draft for service in the military forces, to the injury of the service and of the United States"; that thereafter, at various times between June 16, 1917, and October 1, 1917, to effect the object of the conspiracy they caused a number of articles to be printed in the before-mentioned newspaper and the latter to be put in circulation through the mails and otherwise. The articles, together with the dates of publication, are all set forth in the indictment. Many grounds of demurrer have been assigned, but they raise comparatively few questions, which will hereafter appear. * * *

2. As before noted, the indictment alleges that the object of the conspiracy was to obstruct the "recruiting and enlistment service" by inducing not only volunteers not to enlist but also to induce persons liable to be drafted into military service, pursuant to the Selective Service Act of May 18, 1917 (40 Stat. 76), "to refuse to submit to registration and draft." It is urged that the provision in question of the Espionage Act has reference only to voluntary enlistments and the machinery and "service" set up by law to procure the same, and, consequently, does not embrace the selective draft service or persons subject to the provisions of the Selective Service Act. Hence, it is argued that the indictment is defective in that it alleges a conspiracy to obstruct the "draft" and also a conspiracy to obstruct voluntary enlistments, both objects being so connected in the indictment that they cannot be separated so that one may be discarded as surplusage. I think that this latter proposition is well founded if the premise on which it rests is correct. The question, therefore, is whether "the recruiting or enlistment service of the United States" referred to in the provision in question of the Espionage Act embraces the "service" created by the Selective Service Act. One's first impression from a mere reading of section 3 of title 1 of the Espionage Act might readily be that the "service" intended was that which has to do with procuring voluntary enlistments. But, of course, a statute should not be construed on a mere superficial impression. The decisions rendered prior to the passage of the Espionage Act afford little assistance on this question. In *Babbitt v. United States*, 16 Ct. Cl. 202, it was held that the word "enlistment" was of technical origin, derived from Great Britain and had reference only to a voluntary acknowledgment to serve as a private soldier for a certain number of years; on the other hand, the Supreme Court of Massachusetts, in *Sheffield v. Inhabitants of Otis*, 107 Mass. 282, held that the word "enlisted," in a Massachusetts statute which dealt with the question of settlement of those who had enlisted in the War of the Rebellion, referred to drafted men as well as volunteers. Nowhere in the statutes, so far as diligent and able counsel have been able to ascertain, is "the recruiting service" or the "enlistment service" spoken of in terms, although the machinery for procuring "recruits" by voluntary enlistment is provided for. U. S. Comp. Stat. 1916, vol. 4, pp. 3610, 3799, 3800, 3810. The expression "the recruiting or enlistment service of the United States," so far as the literal meaning of the words used is concerned, may as well apply to both the "service" created by the Selective Service Act and that which has to do with securing voluntary enlistments as to either. It will be noticed that the word "or" is used. Both services are created for the same ultimate purpose—

the raising of an army; the only differences being in the personnel of those composing them and the methods employed by each, respectively. It is necessary, therefore, in order to ascertain the intention of Congress to resort to other means than the literal meaning of the words used. The section in question of the statute is, as Judge Aldrich said in *United States v. Taubert*, Bulletin No. 108, "very broad and comprehensive."

The Selective Service Act speaks (section 6) of "enlistment" in connection with the compulsory service therein provided for, and "voluntary enlistments" (section 7) in connection with the provisions of the act which have to do with such enlistments, thus manifesting, I think, an intention on the part of Congress to use the word "enlistment" in a broad and comprehensive sense. One becomes "enlisted" in the military or naval service, whether he volunteers or whether he is drafted. The Selective Service Act fails to prohibit or provide any punishment for one who obstructs the draft, except for those charged with the duty of executing the law, or persons subject to draft, or to those aiding others to evade the draft. That act was passed almost a month before the Espionage Act, although the latter was introduced some two weeks before the former. On April 19, 1917, the Committee on Military Affairs favorably reported the Selective Service Act, and an effort was made by the chairman of the committee to have it immediately considered, but it was held up so that the Espionage Act might be considered. Congressional Record, vol. 55, p. 879. On April 20, 1917, Senator Lodge introduced as an amendment to what subsequently became section 3 of title 1 of the Espionage Act (which as reported contained no provision regarding obstructing recruiting or enlistments), the following clause: "Or shall interfere with or obstruct the recruiting or enlistment service of the United States." Vol. 55, No. 16, Congressional Record, p. 879. That amendment, in the form now found in the act, was subsequently adopted. It is, therefore, apparent that Congress, having before it the Selective Service Act, which contained no provision to prohibit the obstructing of the "service" thereby created, except as before stated (which will hereafter be shown to be manifestly inadequate to deal with the most dangerous and insidious obstructions), deliberately inserted the clause in question in that part of the Espionage Act which sought to prevent interference with the military forces and efforts of the Nation, and thereafter passed the Selective Service Act without attempting to provide in it for any outside obstructions to the draft.

The irresistible conclusion to be drawn from these facts seems to me to be that Congress intended by the clause in question to prohibit any willful obstruction to the Government in its efforts to raise an army to effectively deal with the crisis which confronted the country and the world, whether it be directed against voluntary enlistments or the draft. As it was not concerned with the means employed to obstruct, neither was it concerned with the particular branch of the "recruiting" service any obstruction might be aimed at. It is inconceivable that Congress intended to prevent any obstruction to voluntary enlistment and to leave unscathed those who would obstruct the workings of the draft law when it is considered that it had committed the coun-

try to the policy of raising an army by draft and when there had been persistent opposition to that method on the part of some classes which might reasonably be expected thereafter to endeavor to obstruct it. Strength is afforded to this conclusion, I think, from the fact that the section 3 of title 1 of the Espionage Act was amended recently—May 16, 1918—so as to be much more comprehensive than before, and yet no change was made in the clause in question except to add the words “attempt to obstruct” and to eliminate the words “to the injury of the service or of the United States.” The latter clause was in the act before the clause “obstruct the recruiting or enlistment service of the United States” was inserted, and therefore related back to and qualified each of the preceding interdicted acts. Considering the thoroughness with which the whole section was revised and that the Selective Service Act contained no provision to prevent obstructions to it, except in the ways before indicated, although many attempts to obstruct it had been made in the meantime, it is difficult to understand why, if Congress did not consider that an obstruction to “the enlistment or recruiting service” covered an obstruction to the draft, some attempt was not made in the amendment to cover obstructions to the draft specifically.

An argument to the effect that Congress had, by the clause in section 3, title 1, of the Espionage Act, prohibiting the causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, covered obstructions to the operation of the Selective Service Law, on the theory that all who are registered are in military forces, although not actually called or inducted into military service, as a number of the judges have held (*United States v. Sugarman*, Bulletin No. 12 [D. C. Minn.] 245 Fed. 604; *United States v. Capo*, Bulletin No. 37 [D. C. Porto Rico]; *United States v. Olivereau*, Bulletin No. 40 [S. C. W. D. Wash.]; *United States v. Wolf*, Bulletin No. 81 [D. C. S. D.]; *United States v. Frerichs*, Bulletin No. 85 [D. C. Neb.]; *United States v. Stokes*, Bulletin No. 106 [D. C. Mo.]; *United States v. Rhuberg*, Bulletin No. 107 [D. C. Or.]; *United States v. Sandvick*, Bulletin No. 113 [D. C. Alaska]), would not be an answer to the argument above advanced regarding the unreasonableness of attributing to Congress an intention not to prohibit obstructions to the draft, because the selective draft service could be obstructed in many ways besides acting immediately on those subject to be inducted into the service through the machinery of the draft. Nor, for the same reason, as well as others, is there any force in the argument that, because a prosecution could be had under section 37 of the Penal Code (Comp. St. 1916, § 10201) for a conspiracy to induce one “to willfully fail to register or present himself for registration or submit thereto,” as has been done in several cases which arose before the Espionage Act was passed (see *Goldman and Berkman v. United States*, 245 U. S. 474, 38 Sup. Ct. 166, 62 L. Ed. —), the clause in question of the Espionage Act has no reference to the Selective Service Act. Section 37 is applicable only to conspiracies and therefore does not cover the case of one, acting alone, who induces another, subject to the provisions of the act, to fail to register, etc. Moreover, the question has been directly considered in *United*

States v. Hitt, Bulletin No. 53 (D. C. Colo.). While the only report of that case which I have seen is the charge of Judge Lewis to the jury, he not only specifically charged that an obstruction to the draft was a violation of the act, but later, when the question was specifically raised by counsel, so held. The charges in *United States v. Capo*, Bulletin No. 37 (D. C. Porto Rico); *United States v. Schenck*, Bulletin No. 43 (D. C. E. D. Pa.); *United States v. Doe*, Bulletin No. 55 (D. C. Colo.); *United States v. Wolf*, Bulletin No. 81 (D. C. S. D.); *United States v. Rhuberg*, Bulletin No. 107 (D. C. Or.); *United States v. Taubert*, Bulletin No. 108 (D. C. N. H.); *United States v. Rutherford* (D. C. E. N. Y.)—all contain expressions which indicate that the several judges who delivered them were of the opinion that an obstruction of the draft was a violation of the provision in question of the Espionage Act. On the other hand, in several jury charges, although there are no expressions indicating that the judges expressly considered that an obstruction of the draft was not within the statute, the only obstruction seemingly dealt with was that which was aimed at voluntary enlistments. *United States v. Frerichs*, Bulletin No. 85 (D. C. Neb.); *United States v. Hendricksen*, Bulletin No. 86 (D. C. Neb., same judge as in *United States v. Frerichs*); *United States v. Stokes*, Bulletin No. 106 (D. C. Mo.). See also remarks in *United States v. Pierce*, 245 Fed. 878, 887 (D. C. N. D. N. Y.).

Those cases, however, shed very little light on the question, because it does not appear that the indictments were so framed as to permit the consideration of it, but on the contrary it would seem that the indictments covered only obstructions to voluntary enlistments. The remarks in *Franke v. Murray* (C. C. A.) 248 Fed. 865, 868, to which counsel refer in support of their contention are in no respect applicable. They had reference only to the fact that the decision in *In re Grimley*, 137 U. S. 47, 11 Sup. Ct. 54, 34 L. Ed. 636, did not apply to the situation which was then before the court and which arose under the Selective Service Act, a different act than was considered in the *Grimley* Case. My conclusion, therefore, is that the clause in question of the Espionage Act covers the obstructing of the operation of the Selective Service Act, except as to such acts as are specifically provided for in that act and which might possibly be said to be obstructions as well as that branch of the military service, strictly speaking, which is charged with the procuring of recruits by voluntary enlistment. * * *

My conclusion, therefore, is that the demurrer should be overruled.

16. In re HENRY.

(District Court of the United States, Eastern District of Wisconsin, 1918.
253 Fed. —.)

GEIGER, District Judge. The facts as presented by the petition in this matter are in brief these:

The applicant, a registrant under the selective service law, was informed against in the criminal court for Milwaukee County, charged, I believe, with the crime of grand larceny. He was taken into custody and thereafter such proceedings were had in such court result-

ing in his offer and its acceptance of a plea of guilty. On the day of the reception of the plea the municipal judge deferred sentence, I believe, until the second day thereafter. At the time or shortly after reception of the plea the local board having jurisdiction over the petitioner served him with a notice, in the ordinary form, requiring him to report for military duty, I believe, on the following day, fixing the hour for his report under the law prior to the time to which the court had deferred the matter of sentencing him. On the following day the petitioner appeared in court, and, in connection with the further proceedings to which the case had been adjourned, advised the court of what had transpired in the meantime, necessarily thereby advising the court of the status which he claimed to have received by virtue of the occurrences in the interim. The court thereupon imposed a sentence, I believe, of two years' imprisonment, which, being done, a motion in arrest of judgment was made, which was denied. Thereupon application is made to this court for a writ of habeas corpus, seeking to discharge the custody which necessarily ensues upon the enforcement of the conviction in the criminal court of Milwaukee County.

Petitioner takes the broad view—asserts, rather—that because of the happening of the contingency under the selective service law, through which he is inducted into the military service, the criminal court lost power to impose sentence. Counsel for the petitioner thus states the contention in a brief, after quoting from service law and its regulations, namely:

"From and after the hour just named (quoting from the notice served) you will be a soldier in the military service of the United States.

"This order of induction (says counsel) is to be found on page 177, section 301, of the selective service regulations and is a part of the law."

The contention is further thus stated:

"The chapter on mobilization, section 157, provides with reference to this matter as follows:

"'From and after the day and hour thus specified each such registrant shall be in the military service of the United States.' Further, section 140, page 72, of the selective service rules provides as follows: 'Persons inducted into military service who absent themselves therefrom with the intent to evade military service are deserters,' and further points out the steps to be taken in cases where such registrants fail to report."

Whereupon it is asserted on behalf of the petitioner:

"From these provisions it is apparent that the military jurisdiction attaches wholly, completely, and entirely from the date named in this order, if not from the date of the making of this order. No other or subsequent time is named as fixing or establishing his status as a soldier. If this be true, then petitioner's personal right to his liberty within this new status as a soldier and under the military jurisdiction is absolute, subject, of course, to military law. In addition to this there is also involved the right of the Federal Government to the jurisdiction of his person, because that jurisdiction has never been surrendered to the civil authorities of the State."

Counsel proceeds:

"It seems to me that in a broad sense there can be no conflict between State and National jurisdiction in cases of this kind, because, immediately upon declaring a state of war, all States and municipalities within the State, and all sworn officers of such organizations become agencies and instrumentalities of the National Government in the prosecution of such war and the marshaling of all of our resources for the purpose."

It may be said that if the premise advanced is conceded, if the selective service law be given the effect claimed for it in what I have read, the conclusion is or may be quite inescapable. I am unwilling to accept the premise. The selective service law is just what it professes to be—a law to enable the raising of an army; and, as I shall say in another case to be determined this morning, the law in and of itself does not effect a change of status. There will be no disagreement upon that point. And, certainly, it is the duty of every agency of the State and of the National Government and of every municipality to give the fullest possible force and effect to that law in order to accomplish the broad purpose. But that is quite a different proposition from giving it an effect which must ascribe to Congress an absurd intention. The mere fact that Congress has stated in the law that certain persons within certain ages shall be liable to be called does not lead to the result upon the terms of this law that everyone of an age, within prescribed limits, merely by virtue of the possession of an age between those limits, must go.

Now, that is said for the purpose of getting to this point, that the law contemplates continued existence of civil authority in all of the States until such time when it shall unmistakably be indicated that ordinary civil authority is superseded. And it is not incumbent upon the courts to ascribe to Congress an intention by this law to supersede a status which attached to an individual prior to the time of its attempted application to that individual, which status involved his incarceration for a violation of the public law of the State. Putting it in a more homely way, it is not fair, at this time at least, to ascribe to Congress an intention to allow the selective service law to operate as a jail delivery measure. In that connection counsel for the applicant was asked a question during the presentation of the matter, whether, if a man who is incarcerated in a State or Federal penitentiary for a long term had that status at the time of his call, it would be the duty of the warden of the penitentiary, as custodian, to surrender him? I think counsel made the only answer possible consistently with his contention in this case—namely, in the affirmative. I am unwilling to give the law that effect, because it ascribes to Congress an intention which it would have effectuated other than through legislation disclosing merely the ranges of ages and the additional direction that those within those ages shall be liable to be drawn. Congress intended to recognize the continued existence of the civil authority of the States and the Nation, and, necessarily, to recognize the continued status which individuals might have acquired by virtue of the exertion of such continued civil authority; and when it appears, as it appears here, that the individual called was lawfully in the custody of the State in the exercise of its civil authority to prevent or to

vindicate infractions of its criminal law, it should not be said that Congress intended that that status should be superseded; and the courts ought to say, as I do in this case, that in view of the relations subsisting between the Federal and the State government, each recognizing the continued existence of the civil authority of the other, a person having this sort of a status under the State authority is not a person liable to be called. And the application for a writ will be denied.

17. U. S. v. FONTANA.

(District Court of the United States, District of North Dakota, 1918. Congressional Record, Oct. 3, 1918.)

Mr. Jones of Washington: Mr. President, it is not in the nature of a petition, but I have just had called to my attention a short statement entitled "A judicial definition of allegiance."

It is a statement made by Federal Judge Charles F. Amidon, of the United States District Court, District of North Dakota, in his decision sentencing Rev. J. Fontana who was convicted of violating the espionage law. This opinion is so clear, so concise a statement of what is due, not only from the citizen to his country but also what is due from the man who asks to be made a citizen, that I think it ought to be placed in the Record. I ask that it may be inserted in the Record. It is found in the Outlook of September 18, 1918.

There being no objection, the matter referred to was ordered to be printed in the Record, as follows:

"A Judicial Definition of 'Allegiance.'"

"The Rev. J. Fontana, pastor of the German Evangelical Church, New Salem, N. Dak., was recently tried at Bismarck, in that State. He was charged with having uttered from time to time seditious language for the purpose of interfering with the military activities of the Government. The presiding judge was Charles F. Amidon, of the United States District Court, District of North Dakota. The jury returned a verdict of guilty against Mr. Fontana on August 15. United States Attorney Hildreth moved for sentence on August 19. In passing sentence Judge Amidon said in part what follows. (The Editors.)

"You received your final papers as a citizen in 1898. By the oath which you then took you renounced and abjured all allegiance to Germany and to the Emperor of Germany, and swore that you would bear true faith and allegiance to the United States. What did that mean? That you would set about earnestly growing an American soul and put away your German soul. That is what your oath of allegiance meant. Have you done that? I do not think you have. You have cherished everything German, prayed German, read German, sung German. Every thought of your mind and every emotion of your heart through all these years has been German. Your body has been in America, but your life has been in Germany. If you were set down in Prussia to-day you would be in harmony with your envi-

ronment. It would fit you just as a flower fits the leaf and stem of the plant on which it grows. You have influenced others who have been under your ministry to do the same thing. You said you would cease to cherish your German soul. That meant that you would begin the study of American life and history; that you would open your mind and heart to all of its influences; that you would try to understand its ideals and purposes and love them; that you would try to build up inside of yourself a whole group of feelings for the United States the same as you felt toward the fatherland when you left Germany. There have been a good many Germans before me in the last month. It has been an impressive part of the trial. They have lived in this country, like yourself, 10, 20, 30, 40 years, and they had to give their evidence through an interpreter. And as I looked at them and tried as best I could to understand them, there was written all over every one of them, 'Made in Germany.' American life had not dimmed that mark in the least. It stood there as bright and fresh as the inscription upon a new coin. I do not blame you and these men alone. I blame myself. I blame my country. We urged you to come. We welcomed you; we gave you opportunity; we gave you land; we conferred upon you the diadem of American citizenship, and then we left you. We paid no attention to what you have been doing.

"And now the world war has thrown a searchlight upon our national life, and what have we discovered? We find all over these United States, in groups, little Germanies, little Italies, little Austrias, little Norways, little Russias. These foreign people have thrown a circle about themselves, and, instead of keeping the oath they took that they would try to grow American souls inside of them, they have studiously striven to exclude everything American and to cherish everything foreign. A clever gentleman wrote a romance called America, the Melting Pot. It appealed to our vanity, and through all these years we have been seeing romance instead of fact. That is the awful truth. The figure of my country stands beside you to-day. It says to me: Do not blame this man alone. I am partly to blame. Punish him for his offense, but let him know that I see things in a new light; that a new era has come here. Punish him to teach him, and the like of him, and all those who have been misled by him and his like, that a change has come; that there must be an interpretation anew of the oath of allegiance. It has been in the past nothing but a formula of words. From this time on it must be translated into living characters incarnate in the life of every foreigner who has his dwelling-place in our midst. If they have been cherishing foreign history, foreign ideals, foreign loyalty, it must be stopped, and they must begin at once, all over again, to cherish American thought, American history, American ideals. That means something that is to be done in your daily life. It does not mean simply that you will not take up arms against the United States. It goes deeper far than that. It means that you will live for the United States, and that you will cherish and grow American souls inside of you. It means that you will take down from the walls of your homes the picture of the Kaiser and put up the picture of Washington; that you will take down the picture of Bismarck and hang up the picture of Lin-

coln. It means that you will begin to sing American songs; that you will begin earnestly to study American history; that you will begin to open your lives through every avenue to the influence of American life. It means that you will begin first of all to learn English, the language of this country, so that there may be a door into your souls through which American life may enter.

"I am not so simple as to entertain the idea that racial habits and qualities can be put aside by the will in a day, in a year, in a generation; but because that is difficult is all the more reason why you should get about it and quit cherishing a foreign life. If half the effort had been put forth in these foreign communities to build up an American life in the hearts of these foreign-born citizens that has been put forth to perpetuate a foreign life, our situation would have been entirely different from what it is to-day. You have violated your oath of allegiance in this: You have cherished foreign ideals and tried to make them everlasting. That is the basic wrong of these thousands of little islands of foreigners that have been formed through our whole limits, that, instead of trying to remove the foreign life out of their souls and to build up an American life in them, they have striven studiously from year to year to stifle American life and to make foreignness perpetual. That is disloyalty. And the object, one of the big objects, of this serious proceeding in this court, and other like proceedings in other courts, is to give notice that that must be stopped.

"I have seen before my eyes another day of judgment. When we get through with this war and civil liberty is made safe once more upon this earth, there is going to be a day of judgment in these United States. Foreign-born citizens and the institutions which have cherished foreignness are going to be brought to the judgment bar of this Republic. That day of judgment looks more to me to-day like the great Day of Judgment than anything that I have thought of for many years. There is going to be a separation on that day of the sheep from the goats. Every institution that has been engaged in this business of making foreignness perpetual in the United States will have to change or cease. That is going to cut deep, but it is coming.

"I recognize the right of foreign-born citizens to hear their religion, if they can not understand it in English, spoken to them in the tongue that they can understand. If they have not yet acquired enough English to read, they are entitled to have a paper that shall speak to them the language that they can understand. I can not go further than that. And this is the capital thing that is going to be settled on that day of judgment, namely, that the right to those things is temporary, and it can not be enjoyed by anybody who is not willing to regard it as temporary and to set about earnestly making the time of that enjoyment as short as possible. That means a fundamental revision of these foreign churches. No freedom of the press will protect a perpetual foreign press in these United States. It won't protect any press or any church which, while it is trying to meet a temporary need, does not set itself earnestly about the business of making that temporary situation just as temporary as possible, and not making it, as has been true in the past, just as near per-

petual as possible. Men who are not willing to do that will have to choose. If they prefer to cherish foreign ideals, they will have to go to their own. If it is necessary, we will cancel every certificate of citizenship in these United States. The Federal Government has power to deal with that subject, and it is going to deal with it. Nothing else than that surely can be possible. And the object of the sentence which I pronounce upon you to-day is not alone to punish you for the disloyalty of which you have been guilty, but to serve notice upon you, and the like of you, and all of the groups of people in this district who have been cherishing foreignness, that the end of that régime has come. It is a call to every one of you to set about earnestly the growing of an American soul inside of you.

"The court finds and adjudges that you are guilty under each count of the indictment, and as a punishment therefor it is further adjudged that you be imprisoned in the Federal penitentiary at Leavenworth for the term of three years. The sentences under the three counts of the indictment are to run concurrently and not successively."

D. JUDGE ADVOCATE GENERAL'S OPINIONS¹

(I) MISCELLANEOUS TOPICS

1. NATURALIZATION OF ALIEN DISCHARGED FROM NATIONAL GUARD

October 4, 1917.

Mr. Howard I. Marshall, Buffalo, New York.

Sir: I have the honor to reply to your inquiry of September 20, 1917.

The question presented is whether or not an alien who has been honorably discharged from the National Guard, after having been actually in the service of the United States of America, is entitled to be naturalized on proof of one year's residence in the United States, under the provisions of section 2166 of the Revised Statutes of the United States. The Constitution of the United States, article 1, section 8, paragraphs 15 and 16, provides Congress shall have power—

"15. To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.

"16. To provide for organizing, arming, and disciplining, the Militia and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

Under paragraph 15, power is given to call the militia into the service of the United States only as therein enumerated, and it must follow that it must be within the United States.

Section 111 of the National Defense Act contemplated a necessity the using of the men comprising these forces for other purposes and provided that the President may draft into the military service of the United States any or all members of the National Guard. All previous laws in reference to military service of the National Guard provided for the call by the President of the organized militia. As thus constituted, the President had no power to appoint officers, that power being specifically reserved to the several States by the Constitution.

Under the provisions of section 111 of the National Defense Act only the individuals were called, and after they were called the President alone was given power to officer new organizations by appointment of officers to the rank of colonel, and above that rank by appointment by and with the consent of the Senate.

A new oath was prescribed and the men were specifically discharged from the National Guard and stood subject to the laws and regulations governing the Army of the United States; for example, they could be subject to court-martial by army officers only, and not as before by

¹ The Roman numerals and letters appended to the first catchword of the topical heading to each opinion refer to the Topical analysis used in the "Digest of Opinions of Judge Advocates General of the Army," Washington, 1912.

a court-martial composed in a majority by members who were National Guard officers. The President, however, had never exercised the powers given him by the National Defense Act until the draft of 1917. Your service being under the constitutional provision for calling the body of the National Guard into the military service of the United States did not bring you into the provisions of section 2166 of the Revised Statutes of the United States.

It is, therefore, the opinion of this office that not having been in contemplation of the Constitution and laws a part of the Army of the United States, your case does not come under the provisions of section 2166 and that you cannot be naturalized without following the ordinary provisions of the Naturalization Laws.

We appreciate your position and the high spirit of patriotism that prompts your inquiry but we do not at this time see a way to relieve the situation.

Very respectfully, [Signed] S. T. Ansell,
CJL. Acting Judge Advocate General.

2. STATE POWER TO RAISE HOME GUARD

Militia I, IV.

October 13, 1917.

Memorandum for the Chief, Bureau of Militia Affairs.

Subject: State forces for local use.

1. In various ways the question is arising whether during the present war a State may lawfully raise and maintain troops, which resemble in all or almost all respects the well-known militia of the several States as it hitherto existed, for service within its own boundaries exclusively.

2. By the Constitution "no State shall without the consent of Congress keep troops or ships of war in time of peace." Art. 1, § 10, cl. 3. In time of war, therefore, a State has the constitutional right to maintain "troops." Doubtless the prohibition in the National Defense Act (section 61 [Comp. St. 1916, § 3044b]) that "no State shall maintain troops in time of peace other than * * * under this act," is but an allusion to the constitutional prohibition. In time of war, then, a State may keep "troops." It must be confessed that such troops are something of a novelty; and whatever is said about them must be said with caution. The words "militia" and "troops" are contrasted much as in the Constitution (Art. 1, § 8, cls. 12, 14, 15 and 16) the word "militia" is contrasted with "army" and "forces." The distinction is historical in its nature. Militia were well known in the colonies and in Great Britain and had as their distinguishing characteristics the voluntary enrollment of all men of certain ages and the absence of technical training and of habitual service. "Armies," "forces," and "troops," on the other hand, are words designating specialists, trained soldiers, continuously under military control and discipline, whose primary purpose is to fight and whose activities are continuously directed to military training and readiness. *Dunne v. People*, 94 Ill. 120, 34 Am. Rep. 213 (1879); *Presser v. Ill.*, 116 U. S. 252, 6 Sup.

Ct. 580, 29 L. Ed. 615 (1886); *State v. Wagener*, 74 Minn. 518, 77 N. W. 424, 42 L. R. A. 749, 73 Am. St. Rep. 369 (1898); *Smith v. Wanser*, 68 N. J. Law, 249, 52 Atl. 309 (1902); *City of Salina v. Blaksley*, 72 Kan. 239, 83 Pac. 619, 3 L. R. A. (N. S.) 168, 115 Am. St. Rep. 196, 7 Ann. Cas. 925 (1905); and *Alabama Great Southern R. Co. v. U. S.*, 49 Ct. Cl. 522 (1914). A state may, then, in time of war maintain forces resembling the army of the United States, whose functions, however, are much more restricted, for as a State, unlike the United States, "cannot engage in war unless actually invaded or in imminent danger as will not admit of delay," it seems to follow that a State, even in time of war, cannot act otherwise than defensively, although, to be sure, defense must include in an emergency preventive expeditions outside the boundaries. To attempt to cover all possible peculiarities of State troops as distinguished from militia seems unnecessary, for I think it is obvious that the forces whose maintenance is now contemplated by the several States do not constitute "troops" within the meaning of that clause of the Constitution which has just been discussed; but that, on the other hand, they are in fact similar to, if not the same as, the militia as it existed prior to the Dick Bill, or, it may be, as it existed prior to the enactment of the recent National Defense Act, the primary purpose of which is to maintain local order when occasion shall arise for their use. The forces contemplated are, in my opinion, in law and legal effect militia.

3. Congress has provided in the National Defense Act for the organization of the militia of the several States under the name of "National Guard," and in the absence of other and modifying legislation I should have been disposed to hold that the organization prescribed by Congress was an exclusive one, and that when Congress has entered upon this field of organization, the States may not enter it; and that, therefore, assuming the constitutionality of the National Defense Act, the States would have to content themselves with the maintenance of "troops" defined as hereinbefore indicated, or the militia organized as required by the National Defense Act and subject to all the liabilities and obligations provided by that act, or to the maintenance of state police or constabulary. But while I think such would have been the necessary holding in the absence of other legislation, the recent act of June 14, 1917 (40 Stat. 181), requires a different conclusion. That act, entitled "An Act to authorize the issue to States and Territories and the District of Columbia of rifles and other property for the equipment of organizations of home guards," authorizes the Secretary of War during the existing emergency to issue from time to time to the several States and Territories and the District of Columbia certain equipment for "home guards having the character of State police or constabulary * * * and such other home guards as may be organized under the direction of the governors of the several States * * * or other State troops or militia." The forces contemplated fall, I think, within the purview of this Act. I must, therefore, hold that the states have the authority to maintain such organizations for local service as seem to be contemplated by the papers presented me.

4. Whatever the character of such forces, however, they are capable of being called by the Nation into the service of the United States

as militia for the usual constitutional purposes; and, further, the members as individuals can be drafted by the Federal government. But inasmuch as such forces do not constitute the National Guard, as the National Guard is known to the recent National Defense Act, the members thereof are not subject to draft under the second paragraph of section 1 of said act as members of said National Guard.

[Signed] S. T. Ansell,

CJL.

Acting Judge Advocate General.

3. DRAFTING NATIONAL GUARD

Militia I, II—Rank II A 2.

Rank II, Articles of War 119 (New).

1st Ind.

War Dept., J. A. G. O., Oct. 22, 1917.—To the Chief of the Militia Bureau.

1. The views of this office are desired relative to the rank of two colonels in the 1st Brigade, Infantry, Minnesota National Guard. The military records of these men are as follows:

Colonel Huber V. Eva was in the service of the National Guard of Minnesota from May 8, 1898, to November 18 of that year. He was, during that time, Captain of Company A, 14th Regiment of Minnesota Volunteers, and served during that time in the Spanish-American War. From the 30th of June, 1916, to the 19th of September of that year, he was a colonel in the 3d Minnesota Infantry, and served on the Mexican border. He claims in all a total service of 368 days.

Colonel E. D. Luce was in the service of the National Guard of Minnesota from the 30th of June, 1916, to the 14th day of July, 1917. He was, from the 30th of June, 1916, to the 14th of March, 1917, on the Mexican border; and from the 26th day of March, 1917, to the 14th day of July, 1917, he was, under the call, doing duty as a National Guardsman in protecting public utilities. He claims a total service of 369 days.

2. It is stated by the Militia Bureau that these men were called into the Federal service on the same date. This being the situation, the question of their relative rank in the Federal service must be determined by section 1219, R. S. (Comp. St. 1916, § 1921), and the 119th Article of War (Comp. St. 1916, § 2308a). These statutes relate to rank and precedence among Regulars, Militia and Volunteers, and provide for appointment and commission. In an opinion by this office rendered October 17, 1917, in commenting upon the meaning and intention of these enactments, it was observed:

"That section 1219, R. S., applies to officers of the Army, without express regard to classes; and that the 119th Article has to do with arranging all officers in the service of the United States into classes and specifying the order of precedence of these classes. Obviously, an officer of the senior class will rank any officer of the same grade in a junior class, regardless of respective dates of appointment or other

incidents of office. In the determination of rank as between officers of the same grade and date of appointment of the different classes enumerated in the 119th Article, section 1219, R. S., can have no application whatever, and, construing the two statutes together as they must be construed, the latter finds its field of operation only in determining rank inter sese between officers of the same grade and date of appointment within a single one of the several classes enumerated in the Article."

The service of these men can be sharply distinguished as service in the Spanish-American War and service as National Guardsmen on the Mexican border and in guarding public utilities. It is the distinction between service in response to a call as distinguished from service rendered pursuant to a draft into the Army of the United States. Therefore, the question is squarely presented: What is actual service as a commissioned officer of the United States? This office held, in the opinion just referred to, that the service required is service as a commissioned officer of the United States, and that the office must be an office of the United States, established by the laws of the United States; and that the appointment to fill it must be made in the manner provided by the Constitution and laws of the United States. Under such holding, clearly service in the National Guard, whether when called into the Federal service or otherwise, could not be the service which is required by section 1219, R. S., and that officers of the National Guard cannot be officers of the United States, and that the National Guard itself, whether within or without the service of the United States, is no part of the United States Army. In this connection the sharp legal and historical distinction between the National Guard of the several states and alter nomen for the militia of the several states, and the Army of the United States, must be considered and recognized. The militia status of the National Guard obviously remains in effect up to the point where the individual members thereof are by draft placed in the Army of the United States. Therefore, whether the National Guard be not in the service of the United States, or whether it be called into the service of the United States for the constitutional purpose "to execute the laws of the Union, suppress insurrection or repel invasion," it is still a state force; and its relation to the Federal government is that of a state military force subject, under the Constitution, to be requisitioned as such for limited Federal purposes. The National Guard as such never became Federalized. Its members became a Federal force only when drafted into the Army of the United States, and its officers became officers of the United States only when, upon the draft they became appointed officers of the United States Army.

3. The National Defense Act never loses sight of this distinction. The constitutional power of Congress calling the militia into the Federal service is invoked by section 101 of the bill which contemplates the call of the National Guard as such; that is, an Organized Militia for the specified constitutional purposes. When in the active service of the United States under such call the militia serves as militia of the several states. But an entirely different constitutional power is invoked by section 111 of the National Defense Act. That section provides

for the draft of the members of the militia into the Army of the United States for general war purposes. There the constitutional power of Congress to raise and support armies is not as members of the National Guard or militia nor to serve as militia, but as members of the Army of the United States. There is, then, no such thing as drafting the National Guard into the Federal service as such; only its members as individual citizens are drafted. The National Guard with its officers, its organizations and its organizational relations is not drafted. There is no connection in the eyes of the law between the status which an individual occupies as a member of the National Guard, and the status which he occupies after he has been drafted into the service of the United States; and there is no connection between those two statuses. The service of an officer in the former capacity is not service as a commissioned officer of the United States, nor is it service in the Army of the United States. The service of an officer in the latter capacity is, of course, service as a commissioned officer in the Army of the United States. The National Guard, therefore, called, for constitutional purposes, into the service of the United States is obviously not a part of the Army. This distinction is preserved and sharply recognized in the National Defense Act.

4. By way of summary, the only service that can be counted in determining rank and precedence is service as a commissioned officer of the United States, and not service as a commissioned officer of the National Guard called, for constitutional purposes, into the Federal service. The National Guard, or the Organized Militia, called into the service in its militia capacity is to be sharply distinguished, in its Federal relation, from the National Guard drafted into the Army. In the former case the National Guard is primarily a state institution subject to a limited Federal use without changing its legal status; in the latter the members of the Guard become officers and soldiers of the Army of the United States. The service of an officer in the former capacity is not service as a commissioned officer of the United States, while the service of an officer in the latter capacity is, of course, service as a commissioned officer.

5. It is therefore the opinion of this office that an officer of the Army of the United States cannot count his commissioned service in the National Guard when called into the service of the United States for constitutional purposes in order to establish his rank over other officers of the same grade and date of appointment; that rank is a matter of statute, and is to be determined by the statute and not by general considerations; and that National Guard service on the Mexican border, or in guarding, in response to a Federal call, public utilities, is not service under draft, and is not service as a part of the Army of the United States. In a word, the conclusion must be that service rendered by an officer of the National Guard is not and cannot be service as a commissioned officer of the United States Army.

[Signed] S. T. Ansell,

Acting Judge Advocate General.

CJL.

4. COMMANDING OFFICERS' AUTHORITY TO AID CIVIL AUTHORITIES WITH TROOPS

Army II D.

2d Ind.

War Department, J. A. G. O., October 25, 1917.—To the Adjutant General.

1. The question asked is whether the commanding officer at Fort Pike, Arkansas, can be authorized by the War Department to act upon his own initiative, "without waiting to communicate with the War Department in the event that a request should be made by the Governor of Arkansas for aid in suppressing riot or other civil disturbance beyond the control of civil authorities."

2. The use of Federal troops for this purpose is made possible by the Constitution of the United States, article 4, § 4. The Constitution does not specify by what Federal official the emergency is to be determined. By statute Congress has conferred this power and responsibility upon the President. Attention is invited to Army Regulations (1913; corrected) article XLVII. The power and responsibility cannot be delegated.

3. Hence the commanding officer cannot receive the authority suggested.
[Signed] Herbert A. White,
Acting Judge Advocate General.

5. DELIVERY OF ACCUSED SOLDIER TO CIVIL AUTHORITIES

Articles of War LIV, I 1.

2d Ind.

War Department, J. A. G. O., October 30, 1917.—To the Adjutant General.

1. There was transmitted to this office for remark telegram to you from General Plummer, commanding at Camp Dodge, Des Moines, Iowa, as follows:

"Following telegram received: 'Tama, Iowa, Oct. Twenty-fifth, Major Gen'l Plummer, Camp Dodge, Iowa. I hold felony warrant John W. Weich of Tama County contingent. Will you release him to me Sunday. Answer at my expense. N. S. Peterson, Sheriff Tama County, Toledo, Iowa.' No directions having been received covering policy during war as to surrendering men under Seventy-Fourth Article of War [Comp. St. 1916, § 2308a] request instruction in this case and for future guidance."

2. The views of this office can be best expressed by quoting the following from communication to you under date of June 11, 1917:

"* * * The present is a time of war, and a commanding officer is not required by the article to turn over to the civil authorities one subject to military jurisdiction and charged with a civil offense; nor, unless instructed so as to do by the War Department, or proper superior determining such matters of policy, should he do so, inasmuch as the right of the Government to the military service of one so ac-

cused in time of war is paramount to all other rights if the Government sees fit to assert it.

"In my judgment the proper policy should be to decline to turn over one subject to military jurisdiction and charged with a civil offense except where the offense charged is a most serious one, such as common-law felonies, primarily against the civil community, which would serve to disqualify the offender for military service and association with upright and honorable men, and the commanding officer reasonably believes that the charge is not without proper foundation and the accused will be accorded a fair trial without prejudice due to his military status."

3. Accompanying this communication is a form of telegram, which it is suggested you send to General Plummer.

4. It is recommended that instructions be sent to the commanding officers throughout the country advising them of the policy of the Department, and directing that whenever application is made by the civil authorities for the surrender of a member of the military forces that a report should be at once transmitted to the Department so as to enable it to dispose of the matter in accordance with the policy outlined.

AGO 201.

CJL.

[Signed] S. T. Ansell,
Acting Judge Advocate General.

6. TRANSFERS OF ENLISTED MEN FROM ONE BRANCH TO ANOTHER *Army I.*

2d Ind.

War Department, J. A. G. O., November 1, 1917.—To the
Adjutant General.

1. The opinion of this office is requested on the question of whether there "is any legal necessity longer to adhere to the distinction between Enlisted Reserve Corps men, Regular Army, National Guard, National Army, etc., in so far as the individual status is concerned." The question is further asked as to whether or not there is any legal reason why enlisted men of the Regular Army, National Guard, National Army, or other divisions of the Army may not be regarded as interchangeable and why they should not all be carried on the same muster roll.

2. In an opinion of this office, dated September 17, 1917, the following statement was made which bears upon the matter here in question:

"In the light of what I have said, my response to the specific question must be that transfer of enlisted personnel from one force to another, in the sense of absolute incorporation in the force to which transferred, is permissible under the law; and, giving the reasoning the wider application it deserves, it seems to me to require the Department to abolish many of the distinctions which it conceives to exist between and among such forces."

3. No legal reason is known to this office why enlisted men assigned to any organization should not be absolutely incorporated therein and

carried on the muster roll as members of that organization without regard to the particular branch of the Army from which the individuals were derived.

4. It follows that the order suggested in the first indorsement hereon and reading as follows:

"During the present emergency distinctions based on differences in the manner in which members of the military forces of the United States of non-commissioned grade, entered the service shall be disregarded. Enlisted men of the Regular Army, National Guard, National Army or other divisions of the Army are interchangeable and may all be carried on the same muster roll,"

—would be perfectly legal and in accord with the decisions of this office as to the interchangeability of the enlisted personnel pertaining to the various forces which make up the Army of the United States.

[Signed] S. T. Ansell,

CJL.

Acting Judge Advocate General.

7. OFFICER'S INTEREST IN GOVERNMENT CONTRACT

Contracts XV.

November 6, 1917.

Mr. Harrington Emerson, President, "The Emerson Company, Efficiency Engineers," 30 Church Street, New York, N. Y.

Sir: Your communication dated November 2, 1917, has been referred to this office for reply. You state that Major E. E. Arison, Ordnance Officers' Reserve Corps, is a shareholder, director and officer of your company, and request to be advised as to whether he can continue as a shareholder, as a director, or as vice president, or as any one or more of these. You state that none of these positions carries any salary and that they require only infrequent presence.

The matter of interest of officers or employees of the military service in private firms or corporations is affected by section 41 of the Criminal Code, section 3 of the act of Congress approved August 10, 1917 (Pub. No. 41—65th Cong.), and paragraph 521, Army Regulations. The statutes and regulations, briefly stated, prohibit any officer or employee from acting as an officer or agent of the government in making any contract or placing any order with a firm or corporation in which he may have a pecuniary interest as a stockholder or otherwise, or in inducing or advising any officer authorized to make a contract or place an order to make the same with a firm, corporation, etc., in which the officer or employee has a pecuniary interest. So long as the character of duties assigned to the officer or employee does not involve his making any contract or advising the making of any contract with any corporation in which he has a pecuniary interest, the statute is not violated. If the officer or employee is a member of a committee or other body which is charged with the duty of making a contract or placing an order, he may not sit by, even if he takes no direct part in the decision, without making a full and complete disclosure of his interest in any contract proposed to be made with any firm or corporation in which he may have an interest. The law further forbids his

participating in making such contract or placing such order. The regulation as amended August 10, 1917, to make it conform to section 41 of the Criminal Code, reads as follows:

"No person in the military or civil service under the War Department will act as an agent of the United States in advising, recommending, making, or approving the purchase of supplies or other property, or the procurement of services for the military establishment, or in contracting with respect thereto, under which purchase, procurement, or contract he would be admitted to share or receive, directly or indirectly, any pecuniary profit or benefit. If such person finds that his duties require him to act as agent of the United States in a matter from which he may derive financial profit, he will report the facts immediately to proper authority and will be relieved from such duties."

It follows from the foregoing that there is no objection to Major Arison continuing to be a shareholder, director or vice president of your company provided he takes no part, either directly or indirectly, in making any contract or placing any order for the services of your company.

Very respectfully,
CJL.

[Signed] S. T. Ansell,
Acting Judge Advocate General.

8. ARREST OF DESERTER BY CIVILIAN OFFICER

Desertion III C.

AGO 251.21 (Misc. Div.)

2d Ind.

War Department, J. A. G. O., November 16, 1917.—To the Adjutant General.

1. By the preceding indorsement is submitted whether a civilian officer arresting a deserter within his authority can deliver him to the military authorities of the United States outside the limits of his district. It is stated in the within letter from the United States Attorney at Philadelphia, Pa., that this question arises through the Chief of Police of Philadelphia having determined that his police officers have no right to deliver a deserter from the United States Army to the military authorities at Fort Du Pont, Delaware, for the reason they have no authority to detain a deserter so arrested beyond the territorial borders.

2. That the rule of the common law that an officer or private person may arrest a felon without a warrant has never been extended to the case of the offender against the military law was announced in *Kurtz v. Moffitt* (1883) 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458. The rule was there stated that neither an officer nor a private person, without an order or direction of a military officer, could arrest or detain a deserter from the United States Army. But the act of June 16, 1890 (Comp. St. 1916, § 2296), provided for the arrest of deserters by civil officers, and the act of June 18, 1898 (30 Stat. 484 [Comp. St. 1916, § 2297]), provides that:

"It shall be lawful for any civilian officer, having authority under the laws of the United States or of any State, Territory, or District, to

arrest offenders, to summarily arrest a deserter from the military service of the United States and deliver him into the custody of the military authority of the general government."

Congress, by conferring this power upon civil officers, intended to enable civil authorities to aid and assist the military in apprehending and delivering deserters. The effect of these statutes is to clothe the civil officer with Federal authority, or, to phrase it differently, is, for the purpose of arresting and detaining deserters from the United States Army, to make a civil officer a Federal official for the purpose of such an arrest. There is no reason why a civil officer of the State of Pennsylvania authorized by the Federal law to arrest a deserter, cannot deliver him into the State of Delaware. He would be protected by the Federal statute in making such delivery. The powers and duties of police officers of the City of Philadelphia are no doubt the subject of State legislation and, strictly speaking, these powers are not involved in the question whether any such officer has the right to deliver a deserter beyond the confines of Pennsylvania. If the law of Pennsylvania should restrict the right of its civilian officers to comply with the Federal law, it would be unconstitutional in so far as it refused to recognize the Federal statute as the supreme law of the land. As to whether a civil officer of the State of Pennsylvania would vacate his State office by assuming to exercise the duties necessarily involved in arresting a deserter from the United States Army under and pursuant to the act of June 18, 1898, because he might be held to have accepted by so doing a Federal office the functions of which are inconsistent with his State office, is a question depending entirely upon State regulation and not necessarily involved in this inquiry.

3. It is therefore the opinion of this office that a civilian officer having authority under the law of Pennsylvania to arrest offenders, can summarily arrest a deserter from the military service of the United States and deliver him into the custody of the military authorities of the general government outside of and beyond the jurisdictional limits of the State of Pennsylvania.

[Signed] S. T. Ansell,

CJL.

Acting Judge Advocate General.

9. TRANSFER OF OFFICER FROM ONE BRANCH TO ANOTHER *Office III C.*

1st Ind.

War Department, J. A. G. O., November 27, 1917.—To the Adjutant General.

1. By your memorandum of the 19th you request a decision as to the most expeditious manner of effecting the change of status of a National Guard officer to that of an officer of the Ordnance Reserve Corps. You further refer to a decision of this office under date of August 30, 1916, to the effect that officers of the National Guard are not eligible for appointment to the Officers' Reserve Corps. In your submission you show the great desirability, from the administrative

as well as the military viewpoint, of permitting change of status; and you urge that, because officers of the National Guard are needed for duty in staff corps or departments, such a change should be permitted without compelling officers of the National Guard to return to a civilian status before they can be commissioned in the Reserve Corps.

2. It is provided in section 37 of the National Defense Act (Comp. St. 1916, § 1881a) that the Officers' Reserve Corps "shall be organized under such rules and regulations as the President may prescribe not inconsistent with the provisions of this act," and in the same section the purpose for which the Officers' Reserve Corps is to be organized is declared to be that of "securing a reserve of officers available for service as temporary officers in the Regular Army as provided for in this act and in section 8 of the Act, approved April 25, 1914, as officers of the Quartermaster Corps, and other staff corps and departments, as officers for recruit rendezvous and depots, and as officers of volunteers. * * *

In construing this section this office said under the date of August 30, 1916, to which reference has been made:

"Since the purpose for which the Officers' Reserve Corps is organized is to provide a reserve of officers, it is a logical conclusion that such a reserve should not be composed of officers already available as such for the military service of the United States. Conformably to this view the President has, by regulation, eliminated from consideration for appointment in the Officers' Reserve Corps those officers of the National Guard and of the Regular Army already available for the military uses of the United States by providing in the first sentence of section III of regulations made pursuant to the authority contained in section 37 of the National Defense Act, quoted supra, that—

"No applicant will be examined who is an officer of the Regular Army on the active list, or the National Guard, or who is not a citizen of the United States' (G. O. 32, W. D., July 28, 1916). * * *

"This regulation, made under ample authority of statute, is in my opinion effective to exclude from appointment in the Officers' Reserve Corps officers either of the National Guard or of the Organized Militia not yet transformed into National Guard, the apparent intent being to exclude from the Officers' Reserve Corps those already bound to the service of the United States through commissions in one of its available forces."

3. However, since the date of the opinion just quoted, the members of the National Guard have been drafted into the Federal service, and the question is therefore clearly presented whether the President has authority to transfer members of the National Guard to the Officers' Reserve Corps, thus avoiding the indirect and circuitous method of requiring a member of the National Guard or the organized militia to resign his commission therein before he is eligible for appointment to the Ordnance Reserve Corps or any other department of the Army of the United States.

4. It is provided in section 2 of the Selective Draft Act, Bulletin No. 32, Act of May 18, 1917, that:

"All persons drafted into the service of the United States and all officers accepting commissions in the forces herein provided for shall,

from the date of said draft or acceptance, be subject to the laws and regulations governing the Regular Army, except as to promotions, so far as such laws and regulations are applicable to persons whose permanent retention in the military service on the active or retired list is not contemplated by existing law, and those drafted shall be required to serve for the period of the existing emergency, unless sooner discharged." 40 Stat. 77.

And the Army, as at present authorized, consists of (1) the Regular Army, (2) the Volunteer Army, (3) the Officers Reserve Corps, (4) the Enlisted Reserve Corps, (5) the National Guard while in the service of the United States and (6) the National Army. This office in an opinion dated September 17, 1917 (J. A. G. O. 6-200), discussed the relation of the different elements or forces composing the Army of the United States, and said:

"This Department must see the Army of the United States as a whole. By the declaration of war, the President is directed to employ the entire naval and military forces of the United States and all the resources of this government to carry on the war. There is, speaking in the fundamentals of law and fact, but one army in this country—the Army of the United States. •It consists, it is true, of a half-score of components. It consists of all those components specified and enumerated in Section 1 of the National Defense Act of June 3, 1916, and in addition, all those other components enumerated in the National Army Act of May 18, 1917—the Organic Acts providing the Army of the United States with which we are to fight this war. There is no one element of this Army that is more truly of the army, either in law or fact, than another. All elements are a necessary part of the Army and all are objects of highest concern. Staff administration is no less important than line training. The Army is a special empire in which the bureaus of this Department (see section 2, National Defense Act, June 3, 1916), the man on the fighting line, the line, the staff, tactical organizations and the agencies that supply them, are all essential constituents. All the components then enumerated in the two Acts above mentioned and all the various subdivisions of those components constitute the Army of the United States under the single command of the Constitutional commander-in-chief and all existing for a single purpose.

"The fact that some of the forces constituting the Army are raised in one way and some in another concerns only the method of establishing the military relation without affecting the obligation of the individual as a soldier or the relation of the force to the Army itself or its subjection to the constitutional powers of the commander-in-chief.

"Since the rights, duties and obligations of the men of all forces are substantially, if not absolutely, the same, it follows the men may be transferred from one force to another without the infringement of any legal right or principle, unless such transfer be inhibited by the statute, and I find no such inhibition. * * *

"This is no time for small or timid things. Success in the realm of force is prejudiced by philosophic distinctions and legal niceties. As legal adviser to the Army and as an officer thereof, I discard, as the law permits me and military efficiency requires me to discard, the theory of separate and independent forces. Such a theory can

be adhered to only with injury to fighting efficiency. Military elements besides the bravery and skill of officers and men are necessary to victory. Scientific organization and efficient administration of an army are indispensable. Battles can hardly be won with forces which are regarded as heterogeneous but only so because of customary conception or legal formulary. Administration should proceed boldly along broad lines to sustain our fighting forces with unity of organization and unity of administration as well as of purpose, if we are to succeed against an enemy who has demonstrated his thoroughness in that field."

5. However, in the opinion just quoted from this office distinguished, with respect to their eligibility for transfer, officers holding commissions with life tenure or tenure for fixed periods from those holding commissions for the period of the emergency, and stated in this connection:

"I have discussed the enlisted personnel and have found nothing in their obligations and nothing in their status to militate against the view here adopted. Addressing myself to the official personnel I come to a similar conclusion except as to (1) the officer of the Regular Army and (2) the officer of the Officers' Reserve Corps. All other officers, whether they have been commissioned in the so-called National Guard component, or in the first additional force, which we call the National Army, or shall be commissioned in the second additional force of five hundred thousand men when drafted, or in any one of the other enumerated forces, have in all respects similar status and obligations. The officer of the Regular Army differs from the officers of the other forces in that his status is permanent and there are many distinguishing characteristics based upon that distinctive feature. Officers of the Regular Army constitute the only personnel in the Army of the United States that is permanent; all else is temporary. The statute clearly recognizes this distinction. Regular officers may not be transferred to the other forces, but they may be appointed thereto in the manner prescribed by statute and not otherwise. Officers of the other forces cannot become officers of the Regular Army, except by original appointment as the statute prescribes. There can be no such thing as transfers of regular officers to the other forces or of officers of the other forces to the Regular Army. So, too, the officer of the Reserve Corps is to be distinguished from officers of the other forces in that he has a fixed, limited tenure of office and a specified use. These incidents preclude homogeneity with the other forces. But the great majority of officers will, of course, belong to the forces other than the Regular Army and the Officers' Reserve Corps and these officers are in all respects on the same plane and their homology should be recognized.

"There are in the eyes of the law but three kinds of commissioned officers; those of (1) Regular Army; (2) all forces, other than the Regular Army, enumerated in the Selective Service Law; (3) Officers' Reserve Corps. I see no reason why administration should not conform."

6. What was said by this office in the opinion quoted from is applicable to the question now before me; and, since a transfer of a

National Guard officer to the Officers' Reserve Corps would change the tenure of his office without authority of law and without his consent, such transfers would not be legal.

7. In the opinion of this office there is no need for such transfers as proposed, since officers in the Ordinance Department may be created in the National Army and in the force composed of National Guard drafted into the service of the United States and officers of those forces transferred thereto, thus accomplishing in effect the result desired.

[Signed] E. H. Crowder, Judge Advocate General.

10. DISCHARGE OF DRAFTED MINOR

December 27, 1917.

From: The Office of the Judge Advocate General.

To: The Division Judge Advocate, 81st Division, Camp Jackson, Columbia, S. C.

Subject: Status of conscripted men who registered when under age.

1. This office is in receipt of your letter of the 7th in which you state applications are being received from the parents of soldiers over eighteen and under twenty-one who registered and were subsequently drafted. You say it has been generally held that men so circumstanced should be discharged. You specifically state:

"It would seem that a man, who, knowing his true age, and being of sufficient age to enlist in the military service, voluntarily registers and is subsequently drafted should be obliged to serve. A different case would be presented if it appeared that the man registered under mistaken belief that he was of the age which would require his registration and subsequently discovered that he was over or under such age."

The question as I view it is whether men who are now claimed by their parents or by themselves to be under twenty-one years of age, but who, in fact, registered and gave their ages as twenty-one years, and thus brought themselves within the draft act, may now be discharged from the military status imposed upon them by the draft, upon application by the parent by way of a writ of habeas corpus or otherwise.

2. The law involved is not the law of voluntary enlistment or muster as contained in the Revised Statutes and the National Defense Act, but the law to be applied is that found in section 2 of the Selective Service Act of May 18, 1917 (40 Stat. 77). It is there provided in effect that all male citizens between twenty-one and thirty years of age are liable to registration and draft; and it is further provided in section 4 of said act that any and all questions of exemption and eligibility shall be determined by boards provided for in said act and appointed by the President under such regulations as he shall prescribe.

3. Clearly, in any view of the law the decision of such boards upon questions of eligibility, including age, is final and beyond judicial inquiry, except in the well known cases of fraud, etc., which operate to the disadvantage of the soldier himself. The decision of such

boards is final and unimpeachable in collateral attack. In this connection your attention is invited to the recently decided case of *United States ex rel. Koopowitz v. Finley*, 245 Fed. 871 (decided in the U. S. District Court for the Southern District of New York, Nov. 3, 1917). There the relator, a citizen of Russia, had never declared his intention to become a citizen of the United States. He was drafted for military service and ordered to report and for failure to report was arrested by the military authorities and charged with desertion. He never made any claim for exemption on the ground of alienage in the manner prescribed by the Presidential regulations. He did, however, state that he had made certain informal claims of exemption and that he failed to make them more formal because of assurances given him by members of the local board that because of his alienage he need not trouble himself further. These claims were denied by members of the local board. It is to the clear statement of the law relating to the decision of such boards that your attention is specifically invited. I quote you the following from the opinion of Mayer, Judge:

"Is a person who failed to claim exemption on the ground that he was a nondeclarant alien, and who now asserts (without contradiction) that he is such an alien, properly in the custody of the military authorities?"

"The remaining question is whether the local board wholly lacked jurisdiction. It is contended because nondeclarant aliens are exempted from the draft that no obligation was placed upon relator affirmatively to present his claim for exemption, and this is but another way of stating that by virtue of the act itself relator was automatically exempted.

"It must be conceded at the outset that Congress had the power to subject all persons to the draft whether citizens or aliens.

"The question, then, is whether, from the structure of the act, it was the intention of Congress that only those who claimed exemption should in proper cases be exempted or whether those entitled to exemption could disregard the procedure provided for by the act and the regulations and show aliunde, as here, that they fell within one of the statutory exempt classes. * * *

"The whole plan of the act is undoubtedly to require that those who claim exemption shall affirmatively present their claim to the appropriate body so that that body can determine as a fact whether the person falls within the exempted classes. When, therefore, no such claim is presented and the proceedings of the local and the district boards are regular in every respect, the court can not go outside of the proceedings of the boards to determine independently something which the act required should be determined by these boards."

4. In the case to which you refer there is no opportunity for fraud except when committed by the man himself and, of course, he could there take no advantage. Even if it were otherwise and the decisions of such boards were not final, judicial inquiry would of necessity reach the same conclusion; for the reason that questions of age gave no privilege to an alleged minor whose contract of enlistment is good as far as he is concerned. This is true because age is not of

the substance of the contract of enlistment, and a person who voluntarily enlists, representing himself to be of proper age, can not destroy the status thus created on the ground that he does not possess the requisite qualifications. To hold otherwise would be to say that a minor is not at liberty to serve his country. It is a fundamental principle of national law, essential to national life, that every citizen, whether of sufficient age to make a contract or not, is under obligation to serve and defend the constituted authorities of the State and Nation and for that purpose to bear arms when such service is required of him. These principles are recognized and discussed in the well known cases of *In re Grimley*, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636, and *In re Morrissey*, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644, where the principle is distinctively enunciated; that the age at which an infant shall be competent to perform any military duty depends wholly upon the legislature; and that questions of eligibility for such service are for the benefit of the Government, the party for whose benefit it is prescribed. If the matter of age were not incidental, then a person enlisting could utter a falsehood to create the military status and then by pleading the truth avoid it whenever it suited his purposes.

5. Where, however, a statute actually forbids in prohibitory terms enlistment under a certain age, then possibly a contract of enlistment might be null and void, although that is doubtful. The sections of the Selective Service Act here under consideration give no room for such question. Neither does the question submitted present an instance where a minor has enlisted without the written consent of his parents or guardian. Such statutes are designed not merely to protect the immature minor from improvident action, but also to preserve the parent's or the guardian's right to his custody and service. And yet the parent or guardian may waive this right by silence or acquiescence in the minor continuing in the service and drawing pay from the Government.

6. I am, therefore, of the opinion that where a district board certifies a registrant as being within the draft age, he cannot be discharged from the military status thus imposed upon him upon application by his parent or guardian, and that in the absence of fraud the decision of the board so certifying is final. To hold otherwise would make the military status a farce, destroy discipline, and offer a premium for falsehood and desertion.

[Signed] Herbert A. White,
For the Judge Advocate General.

11. DUTY OF MILITARY PERSON TO OBEY SUBPENA TO TESTIFY IN CIVIL COURT

Civil Authorities I.

AGO 013.26 (Misc. Div.) 3d Ind.

War Department, J. A. G. O., January 2, 1918.—To the Adjutant General.

1. The views of this office are desired with reference to an inquiry of the Attorney General as to the policy of the Department (a) generally relative to men serving in the Army who may be needed as witnesses for the Government in cases in the Federal Courts; and (b) particularly with reference to the case of Jacob Nottonson, 501st Battalion Engineers, Company D, Camp Merritt, New Jersey, who is a material witness in a criminal case which will be reached for trial in April, and whose detention in the United States for this purpose is desired by the United States Attorney for the Southern District of Texas.

2. Paragraph 996½, Army Regulations, pertinent to the question, provides as follows:

"An officer or enlisted man who receives a summons to attend as a witness before any civil court, or other civil tribunal competent to execute subpoenas, will, before starting to obey the summons, request authority from his commanding officer to obey same."

3. It is the opinion of this office that this Department should render to the Department of Justice every possible assistance in securing the attendance of witnesses at the trial of criminal cases consistent with the interests of the military service. Accordingly, when a member of the military establishment is served with a summons to appear as a witness for the Government in a criminal trial, he should obey the summons unless, in the opinion of his commanding officer, the interests of the military service would be prejudiced by so doing. It is the view of this office, however, that it would be prejudicial to the military interests to detain persons in the United States in order that they may be available as witnesses, and therefore it would be proper military policy to decline any request so to detain such persons.

4. If the witness, Jacob Nottonson, is in the United States when the case in which he is desired as a witness is reached for trial, and he is served with a summons to appear as a witness on behalf of the Government, he should obey the same, unless, in the opinion of his commanding officer, the military service would be prejudiced by his so doing. He should not, however, be detained purposely in this country to await the trial.

[Signed] S. T. Ansell, Acting Judge Advocate General.

12. GOVERNMENT REIMBURSEMENT OF PERSONAL INJURY—JUDGMENT AGAINST CONTRACTORS

Contracts XXXIX.

AGO 248.57 (Misc. Div.) 2d Ind.

War Department, J. A. G. O., January 4, 1918.—To the Adjutant General.

1. The Adjutant General refers to this office a letter from the officer in charge of the cantonment construction at Yaphank, Long Island, dated December 29, 1917, requesting an opinion as to whether the Government shall defend a suit for damages for personal injuries of one Dominick Perrone v. Thompson-Starrett Company, a general contractor for the construction of Camp Upton; and if there is a judgment for plaintiff, is the Government liable to the defendant under its contract? The first paragraph of the letter from the officer in charge of the cantonment construction, of December 29, refers to a letter from the Constructing Quartermaster, Camp Upton, dated December 26, 1917, with reference to the subject matter and inclosing a copy of a letter from the Thompson-Starrett Company, dated November 10, 1917, which is not included in the papers submitted.

2. The papers submitted show that the Thompson-Starrett Company, a corporation, is the general contractor for the construction of Camp Upton, doing its work under the usual form of contract for emergency work. The Barrett Construction Company, another contracting concern, had the contract for the road construction at Camp Upton. On September 20, 1917, one Tony Reale, who was the owner of and operating his truck in the service of the Thompson-Starrett Company, struck a scraper being operated by Dominick Perrone, an employee of the Barrett Company, causing injury to the said Perrone resulting in his death. The representatives of Dominick Perrone have brought suit against the Thompson-Starrett Company for damages arising out of the death of the decedent and the Thompson-Starrett Company regards the defense of this suit as a matter for the attention of the Government.

3. The pertinent parts of the contract with the Thompson-Starrett Company are:

"Article II.

"The Contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the Contracting Officer and as are included in the following items: * * *

"(h) Such bonds, fire, liability and other insurance as the Contracting Officer may approve or require; and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the Contracting Officer to have been actually sustained (including settlements made with the written consent and approval of the Contracting Officer) by the Contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the Contractor. * * *

4. In an opinion by this office under date of December 20, 1917 (J. A. G. 152), in the case of William and Helen Braasch v. The Thompson-Starrett Company, in a claim for personal injuries, it was stated:

"This suit does not concern the United States. It is a suit against the Thompson-Starrett Company, based upon its alleged negligence, and should be defended by it at its own expense."

In the instant case the action is grounded upon alleged negligence of an employee of the Thompson-Starrett Company and if recovery should be had, it would be upon the theory of negligence. Section h, article II, of the contract, *supra*, expressly provides that the contractor shall not be paid for losses or expenses incurred by his fault or neglect. This provision is broad enough to and does preclude any payment to the contractor for losses or expenses incurred by reason of an act of negligence of its agents or employees.

The company is an independent contractor and the fact that its compensation is fixed in article III of its contract upon a percentage basis does not make it an agent of the Government; and if it were an agent of the Government, the United States would not be liable for an act of negligence committed by it or its agent, it being a well settled rule of law that the United States is not liable for negligence of its officers or agents. *Bigby v. U. S.*, 188 U. S. 400, 23 Sup. Ct. 468, 47 L. Ed. 519.

5. There appears in the papers submitted a telegram from O'K. Myers, Major Quartermaster, under date of September 20th, addressed to Colonel I. W. Littell, in which this officer assumes that the instant case is a public liability case, basing his assumption upon the telegram addressed to all constructing quartermasters under date of June 28, 1917, in words and figures following:

"You will at once obtain insurance protecting your material against fire during time between delivery by carrier and acceptance by Government also such workmen's compensation insurance as required by statutes. Other insurance risks assumed by Government. Your attention directed to clause H Article two whereby Government does not assume responsibility for losses and expenses resulting from your fault or neglect. Detailed instructions mailed.

"[Signed] Littell."

This telegram does not warrant such a conclusion. The sentence therein, "other insurance risks assumed by the Government," indicates that after material had been put into a building and become the property of the United States, the Government carried its own risk, which is a policy long adhered to by it.

6. I am of the opinion that the defense of the suit of Dominick Perone v. Thompson-Starrett Company is not a matter for the Government, but one in which the Thompson-Starrett Company is alone interested; and any judgment recovered therein against the Thompson-Starrett Company would not be properly chargeable to the Government under its contract quoted *supra*.

[Signed] S. T. Ansell, Acting Judge Advocate General.

13. ALLOTMENT OF PAY DURING ILLNESS DUE TO MISCONDUCT
Pay and Allowances I C.

2d Ind.

War Dept., J. A. G. O., January 5, 1918.—To the Adjutant General.

1. There are referred to this office for answer the three following questions submitted by the commanding officer of the Army Hospital, Hoffman Island, New York, to the Director of the Bureau of War Risk Insurance:

(a) Can a man make allotment for dependent relative while in hospital under provisions of G. O. 45, W. D. 1914?

(b) In case allotments have been made, are they discontinued during periods when soldier is in hospital under G. O. 45, W. D. 1914?

(c) Are allotments for dependent relatives, insurance and Liberty Bonds automatically discontinued for all periods when soldier is on sick report under provisions of G. O. 45, W. D. 1914?

2. The Act of April 27, 1914 (38 Stat. 351, 353 [Comp. St. 1916, § 2104a]) upon which G. O. 45, W. D. 1914, is based, provides as follows:

"That hereafter no officer or enlisted man in active service, who shall be absent from duty on account of disease resulting from his own intemperate use of drugs, or alcoholic liquors, or other misconduct, shall receive pay for the period of such absence, the time so absent and the cause thereof to be ascertained under such procedure and regulations as may be prescribed by the Secretary of War."

Article II of the War Risk Insurance Act compels an enlisted man who has a wife, child, or divorced wife to whom alimony has been decreed, to allot a portion of his pay for their support. Although this amounts to a disposition of such portion of pay by Congress, it cannot fairly be said to be inconsistent with the above quoted provision, which in terms deprives a man who is absent for the reasons therein specified, of all of his pay. Consequently, during the period of such absence there is no pay from which an allotment, either compulsory or voluntary, can be made. The stoppage or forfeiture of pay herein involved differs materially from a forfeiture imposed by sentence of a court-martial. A court-martial has no power to dispose of any property of an enlisted man which Congress has already disposed of. But Congress has the undoubted right to prevent the accrual of pay or to impose a forfeiture of all pay as a penalty for absence caused by misconduct. Therefore, when Congress disposes of a percentage of a man's pay by compulsory allotment, that percentage is beyond the power of a court-martial to forfeit. But when one statute provides for forfeiture of all pay and another requires a compulsory allotment of a portion of pay, the question presented is not one of power but merely one of statutory construction. As pointed out above, the two statutes are not inconsistent. Reasonably interpreted they require the forfeiture of all pay, whether allotted or not, for absence caused by misconduct of the kind specified. Therefore, the first inquiry must be answered in the negative and the second and third in the affirmative.

3. Closely connected with the questions submitted is that of the

effect of such absence from duty upon the allowances made to dependents under article II of said Act. The object of this legislation is clearly to provide for the support of these dependents during the period of military service of the person upon whom they are dependent. It should, therefore, be construed, if possible, so as not to visit the sins of the enlisted man upon his dependents. And unless the language of the statute so requires, a forfeiture of pay by the enlisted man should not cause a forfeiture of allowance. This view is taken by Judge Mack on page 15 of Bulletin Number 3, Treasury Department, Bureau of War Risk Insurance, Division of Military and Naval Insurance. He there construes the first sentence of section 205 of the Act as authorizing the payment of the allowance to members of Class A, where a compulsory allotment is not waived or exempted. Substantially the same language is used in section 206 with respect to voluntary allotments as in section 205 with respect to compulsory allotments. In this connection the opinions of this office of January 23, 1913 (72-210), and of the Comptroller of the Treasury of January 30, 1913 (19 Comp. Dec. 483), should be noted. These construe the Act of August 24, 1912 [37 Stat. 572], which was practically identical with the Act of April 27, 1914, above quoted. The theory of both these opinions is that the Act in question is penal, that it punishes misconduct rather than regulates pay, and that it forfeits the man's pay as a penalty rather than stops it as unearned. If the Director of the Bureau of War Risk Insurance adopts the theory of these opinions, there will be nothing to prevent his applying Judge Mack's interpretation to cases arising under this Act and G. O. 45, W. D. 1914. With him, and not with this office, rests the decision as to allowances.

[Signed] S. T. Ansell, Acting Judge Advocate General.

14. INDUCTION OF A MINOR FALSELY REGISTERING AS OVER AGE
West System Key-No. Army and Navy 20.

January 16, 1918.

From: The Office of the Judge Advocate General.

To: The Division Judge Advocate, 39th Division, Camp Beauregard, Louisiana.

Subject: Opinion on discharge of drafted men.

1. This office is in receipt of your letter of the 4th, in which you ask for an expression of opinion on the following proposition:

"An application for discharge is presented by a soldier who claims that he had not reached the age of twenty-one years complete on the date of his registration. The excuse offered for the registration is that, if he had said that he was not twenty-one years of age, he would have lost his job. I construe the excuse as an admission that registrant knowingly gave a false answer relative to his age. The application for discharge was not made until after the soldier was inducted into the service and after reaching majority. * * *

"The Adjutant General of Arkansas (the soldier comes from that State) urges the discharge on the theory that he has the right to

have the registration cancelled under the provisions of section 61 of the Selective Service Regulations. My opinion is that the section mentioned was not intended to cover cases inducted into the service prior to December 15, 1917."

Broadly, the question, as I view it, is whether a man who registered and gave his age as 21 years, thus bringing himself within the draft act, may be discharged and relieved from the military status thus willingly assumed, and purposely self-imposed.

2. The law involved is not that of voluntary enlistment but is the law as found in section 2 of the Selective Service Act of May 18, 1917 (40 Stat. 76). It is there provided that all male citizens between 21 and 31 years of age are liable to registration and draft; and it is further provided in section 4 of said act, that any and all questions of exemption and eligibility shall be determined by boards therein provided, and appointed by the President under such regulations as he shall prescribe.

Indeed, in any view, the decision of such boards upon questions of eligibility, including age, are final and beyond judicial inquiry, except in the well-known cases of fraud, etc., which operate to the disadvantage of the soldier himself. The decision of such boards is final and unimpeachable in collateral attack. In this connection your attention is invited to the recent case of *United States ex rel. Koopowitz v. Finley*, 245 Fed. 871 (D. C. S. D. N. Y. Nov. 3, 1917). * * *

This case is printed in *W. D. Bulletin* No. 72—Digest of Opinions J. A. G., Dec. 24, 1917, page 27. * * *

3. In the case to which you refer there is no opportunity for fraud except when committed by the man himself and, of course, he could there take no advantage. Even if it were otherwise and the decisions of such boards were not final, judicial inquiry would of necessity reach the same conclusion; for the reason that questions of age give no privilege to an alleged minor whose contract of enlistment is good as far as he is concerned. This is true because age is not of the substance of the contract of enlistment, and a person who voluntarily enlists, representing himself to be of proper age, cannot destroy the status thus created on the ground that he does not possess the requisite qualifications. To hold otherwise would be to say that a minor is not at liberty to serve his country. It is a fundamental principle of national law, essential to national life, that every citizen, whether of sufficient age to make a contract or not, is under obligation to serve and defend the constituted authorities of the State and Nation and for that purpose to bear arms when such service is required of him. These principles are recognized and discussed in the well known case of *In re Grimley*, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636, and *In re Morrissey*, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644, at which an infant shall be competent to perform any military duty depends wholly upon the legislature; and that questions of eligibility for such service are for the benefit of the Government, the party for whose benefit it is prescribed. If the matter of age were not incidental, then a person enlisting could utter a falsehood to create the military status and then by pleading the truth avoid whenever it suited his purpose.

4. Where, however, a status actually forbids in prohibitory terms enlistment under a certain age, then possibly a contract of enlistment might be null and void, although that is doubtful. The sections of the Selective Service Act here under consideration give no room for such question. Neither does the question submitted present an instance where a minor has enlisted without the written consent of his parents or guardians. Such statutes are designed not merely to protect the immature minor from improvident action, but also to preserve the parent's or guardian's right to his custody and service. And yet the parent or guardian may waive this right by silence or acquiescence in the minor continuing in the service and drawing pay from the Government.

5. Recurring now to the contention of the Adjutant General of Arkansas that the registrant is entitled to a discharge pursuant to the provisions of section 61 of the Selective Draft Regulations, it is evident that this claim is based upon the assumption that the rules and regulations prescribed for the guidance of local and district boards are effective after such boards have fully performed the functions for which they were created—namely, the induction of men into the military service. It is provided in said section 61 for the cancellation of registration by persons not subject to registration. The section is:

"Whenever a claim shall be made to a local board that through error or fraud, a person is registered who is not subject to registration the board shall require the person to submit his claim in writing, together with such proof as he may care to offer. The local board shall forward the claim and the proof with its finding of fact and recommendation to the adjutant general of the state, who shall examine the proof, and, if he is of the opinion that the person was not subject to registration, shall direct the local board to cancel the registration and amend its records accordingly."

Obviously the purpose of this section was to confer upon the adjutant generals of the several states intermediate appellate jurisdiction to pass upon the registration of those persons who, through mistake or fraud, had been registered and certified as eligible for military service. The regulation was doubtless intended to reduce the number of appeals which might be taken to the President or to grant relief in those cases in which the decision of the district board was final and no appeal would lie to the President. It will be observed that the section is applicable only to that class of cases where the registration rests upon fraud or error of such a character as to be akin to deceit or misrepresentation. It does not attempt to confer upon the adjutant general an unlimited power of review, but merely limits his revisory authority to a class of cases where it is assumed that the findings of the local board will be either clearly right or palpably wrong. It will be noted that the section relates only to questions of which the local board has jurisdiction, and that it does not apply to industrial or agricultural claims of which the district board has sole and original jurisdiction.

To hold that this section has any application to a registrant who has been held for military service is to give the local boards power to dissolve the military status after it has been created according to

law. In other words, it would impute to the President the intention of conferring upon such boards a judicial power which the courts have uniformly declared that they do not qua courts possess. To hold after a man has sworn to his own eligibility, and has been inducted into the military service of the United States, that a local board and the adjutant general of a state, each and all of them presumably laymen, were intended to have conferred upon them by section 61, judicial power superior to that which is exercised by the constitutionally created courts of the country is to offer a premium for desertion, to destroy all military discipline, and to make the Selective Service Act a farce.

6. I am, therefore, of the opinion that the application for discharge by a registrant after his induction into the military service upon the ground that he was under twenty-one at the time of his registration is without merit, and that such registrant, having been certified as being within the draft age, cannot be discharged from the military status thus imposed upon him. I am further of the opinion that section 61 of the Selective Service Regulations has no application to such a case, for the reason, among others, that the duties of the local board which this regulation is intended to prescribe are *functus officio* in so far as any such registrant is concerned after he has by the certificate of such board been inducted into the military service of the United States.

[Signed] S. T. Ansell, Acting Judge Advocate General.

15. DISCHARGE OF SOLDIER CONVICTED OF FELONY

Enlistment I A 9 f

AGO 201.

2d Ind.

War Department, J. A. G. O., January 22, 1918.—To the Adjutant General.

1. The opinion of this office is desired upon the request and recommendation of the Commanding General, Northeastern Department, January 10, 1918, that the War Department "waive the violation of section 1118, Revised Statutes" in the enlistment in the military service of Private ———, C. A. C., 8th Company, Portland, who previous to said enlistment had been convicted in the Circuit Court of Scott County, Missouri, of the offense of manslaughter—a felony—and sentenced to two years' confinement in the State penitentiary. It is stated in the papers that ——— is a good soldier and his retention in the service is recommended by his company and fort commanders. Concerning this case, the Commanding General, Northeastern Department, says:

"At the time sentence was imposed, the defendant was paroled for the term of three years unless the parole should be sooner revoked. In August, 1917, nearly two years after his parole had expired, the court purported to revoke his parole, and made application for his surrender, all of which appears by certified copies from the clerk of the Circuit Court, Scott County, in possession of these headquarters. As of course an order revoking the parole two years after the

parole expired is on its face void, regardless of Private ——— statement that he performed all the conditions of parole, surrender of this soldier has been refused."

2. Section 1118, Revised Statutes (Comp. St. 1916, § 1886), provides as follows:

"No minor under the age of sixteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of a felony shall be enlisted or mustered into the military service."

Thus, it would appear that enlistment of ——— was illegal in the sense of its being in contravention of a positive statute, the inhibitions of which the War Department is obviously without authority to waive. Enlistment in the Army is a contract, but it is one of those contracts which changes the status of the enlisted man; and it has been held by the Supreme Court of the United States, that in the absence of insanity, idiocy and infancy or other causes which disable the party from changing his status, the disqualifications for enlistment enumerated in section 1118 are: "matters which do not inhere in the substance of the contract," and do not prevent a change of status, nor render the new relations assumed absolutely void. In *re Grimley*, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636. Also with reference to the disqualifications for enlistment in the Army set out in section 1118, this office has held:

"* * * If one who is physically and mentally capable of rendering the service of a private soldier is employed as a soldier and renders that service, he is a soldier, even though there may be a law forbidding his enlistment in positive terms, unless that law declares him wholly incapable of making a contract of enlistment so that all such contracts entered into with him would be void absolutely. The law that merely provides that he shall not be enlisted would be violated by enlisting him, but that could not alter the fact that he had been enlisted and had become a soldier. * * *"

The rule, therefore, would seem to be well settled that enlistment in the Army in violation of the provisions of section 1118, Revised Statutes—the applicant being otherwise competent to enter into the enlistment contract—is not void but voidable only at the option of the United States. Thus, it appears all that is necessary to hold * * * in the military service as a soldier is for the Government to elect not to avoid the contract because of the illegal enlistment, which may be done by refusing to discharge him from the service until the expiration of his enlistment.

3. As pointed out by the Commanding General, Northeastern Department, the action of the court in revoking the parole, two years after the parole had expired, is clearly without legal effect, and * * * should be held to service under his enlistment.

[Signed] S. T. Ansell, Acting Judge Advocate General.

16. ENLISTMENT OF MINOR UNDER 18 WITHOUT PARENTS' CONSENT

Enlistment 1 A 9 f.

January 25, 1918.

Memorandum for the Judge Advocate General.

1. (a) Should any distinction be made between the Army and Marine Corps in the treatment of minors, and,

(b) Under what circumstances should the Department refuse to grant an application for the discharge of a minor under eighteen years of age, who has enlisted without the written consent of his parent or guardian?

2. There is no statute which in terms applies to enlistments in the Marine Corps. Enlistments in the Marine Corps of the United States are not governed by statutes relating to enlistments in the Navy, but are governed by the statutory provisions relating to Army enlistments by virtue of paragraph 4151 of the Regulations prescribed by the Secretary of the Navy, which reads:

"The regulations for the recruiting service of the Army shall be applied to the recruiting service of the Marine Corps as far as practicable."

In *McCalla v. Facer*, 144 Fed. 61, 75 C. C. A. 219, it was held that the foregoing regulation served to make applicable to men enlisting in the Marine Corps the law governing enlistments in the Army.

3. Upon the question of the discharge of a minor from the military service who has enlisted without the written consent of his parent or guardian, the conclusions deducible from the decisions are:

(a) A minor over sixteen years of age is without power to avoid his enlistment. In *re Morrissey*, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644; In *re Grimley*, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636; In *re Wall* (C. C.) 8 Fed. 85.

(b) To avoid the enlistment by parent or guardian application must be seasonably made. Ex parte *Dostal* (D. C.) 243 Fed. 664; Ex parte *Rush* (D. C.) 246 Fed. 172; Ex parte *Dunakin* (D. C.) 202 Fed. 209; Ex parte *Hubbard* (C. C.) 182 Fed. 76.

(c) If the application for his discharge is not made until the minor had attained the age of eighteen years, his enlistment is validated by his service after attaining such age. Ex parte *Dostal*, supra; Ex parte *Hubbard*, supra.

(d) If the minor is being held for an offense committed against military law, the jurisdiction of the military authorities in the premises cannot be ousted by the civil court. Ex parte *Dostal*, supra; *Dillingham v. Booker*, 163 Fed. 696, 90 C. C. A. 280, 18 L. R. A. (N. S.) 956, 16 Ann. Cas. 127; Ex parte *Foley* (D. C.) 243 Fed. 470; In *re Miller*, 114 Fed. 838, 52 C. C. A. 472; Ex parte *Dunakin*, supra.

17. GOVERNMENT LIABILITY FOR DAMAGE BY MILITARY OPERATIONS

Claims XII.

153 (Misc. Div.)

8th Ind.

War Department, J. A. G. O., February 5, 1918—To the Adjutant General.

1. This is a letter by Mr. F. I. Allen, of Westfield, Massachusetts, for damages due to the occupation of his land as a camp ground by troops, including the removal of trees therefrom and the construction of roads and latrines on the property, during August, September and October, 1917. The amount of said claim is \$60, which amount the claimant agrees to accept in full for all claims and demands against the United States for damages caused to his property. A board of officers convened for the purpose of investigating the said claim reported under date of October 3, 1917, as the conclusion of its findings, that the land used was necessary for the encampment of troops, that the trees cut were removed by order of the camp commander, and that the amount of the claim was reasonable and just.

2. It appears that this property was occupied without any formal lease and that there was no agreement as to any payment for its use or for the timber that might be cut on the property. The Department Commander, Northeastern Department, recommends that the amount of the claim, \$60, be paid to the claimant from the appropriation "Claims for Damage to and Loss of Private Property" for which provision is made in the current appropriation for the support of the Army.

3. The officer in charge of the cantonment division, Quartermaster General's office, to whom the papers were referred, returns them approved for the expenditure of the amount named from the appropriation "Roads, Walks, Wharves and Drainage, 1918," and states that the amount involved will be charged to the general deficiency authorized by the Assistant Secretary of War, December 14, 1917.

4. The Department Commander, Northeastern Department, to whom the claim is returned, requests instructions as to whether in view of the existing emergency, any modification has been made of the specific prohibition against payment of damages of this class, contained in paragraph 153, Compilation of Orders (Cir. 22, A. G. O. 1910), except as prescribed therein and he invites attention to the specific provision in the said circular that in the absence of an appropriation for the purpose the Department is without authority to pay or settle such claims.

5. I do not know of any modification of the prohibition contained in this circular which appears to be based on the well settled rule that the administrative officers of the Government are without authority to settle claims for unliquidated damage. I am of the opinion, therefore, that the appropriation for "Roads, Walks, Wharves and Drainage, 1918," is not available for payment of the said damages.

18. ACQUISITION OF CANTONMENT SITES—STATE JURISDICTION

*Public Property VII A.**Public Property II A.*

February 6, 1918.

From: Office of the Judge Advocate General.

To: The Division Judge Advocate, 86th Division, Camp Grant, Rockford, Illinois.

Subject: Jurisdiction over cantonments—condemnation of lands for military purposes.

1. In your report of November 10, 1917, you request information on certain questions which, with the answer to each immediately thereunder, are as follows:

Question: "3. There is need for an authoritative decision as to the jurisdiction of the United States over lands leased for cantonment sites and as to the extent that States retain jurisdiction in such cases."

Answer: As the lands for these sites have not been purchased with the consent of the State, the United States has not acquired exclusive political jurisdiction thereover under the seventeenth clause of section Eight, article I, of the Constitution of the United States. Moreover, as the lands have not been acquired by the Federal government, but have been merely leased to the Government for cantonment sites, the United States would not have jurisdiction thereover under the statutes, if any, of the respective States ceding jurisdiction to the United States over lands purchased within the State for military purposes, *inter alia*. It would seem, therefore, that the State retains its political jurisdiction within the cantonment site, but the authority of the State is subject to this limitation, that it can not interfere with the legal activities of the Federal government or affect the property rights of that Government. The State can not, therefore, hamper the Federal government in its control over the cantonment site or impose any regulations restricting its use by the Federal government. These are matters within Federal control and are without the field of State jurisdiction. The State, however, retains its political jurisdiction, so that a murder committed within the cantonment site would be triable in the State courts, although, if committed by a person subject to military jurisdiction, it would also be within the jurisdiction of a general court-martial. According to the rule as to divided jurisdiction, the jurisdiction which first attaches retains its jurisdictional authority until it is relinquished or the ends of justice have been satisfied.

Question: "5. Personally, I should like to have any decision from your office or other sources, bearing upon the question of condemnation of lands for military use, other than the Act of July 2, 1917, if any such exist. This office has a great deal of work, in connection with leasing of this cantonment site and target range site, and decisions from other Divisions on questions in connection with like matters would be welcome."

Answer: The Act of July 2, 1917 (Public No. 26, 65th Cong. [40 Stat. 24]), is a reenactment, with modifications, of the Act of August

18, 1890 (26 Stat. 316 [Comp. St. 1916, § 6911]), broadening the prior act so as to include "military training camps;" to authorize the acquisition of temporary interests in the lands; to authorize the immediate possession thereof upon filing of the petition in condemnation; and to waive the requirements of Section 355, Revised Statutes (Comp. St. 1916, § 6902), during the existing emergency. This statute is applicable where the lands are to be acquired for the purposes stated; that is, "for the site, location, construction or prosecution of works of fortifications, coast defense and military training camps." It authorizes the acquisition of lands for these purposes, thereby supplying the authority to acquire the lands required by Section 3736, Revised Statutes (Comp. St. 1916, § 6889), which reads:

"No lands shall be purchased on account of the United States except under a law authorizing such purchase."

Where lands are to be acquired for purposes other than those specified in the Act of July 2, 1917, authority for their acquisition must be sought elsewhere. Thus, in the Signal Corps Act of July 24, 1917 (Pub. No. 29, 65th Cong. [40 Stat. 243]), authority is given "for the purchase or lease of land with the buildings thereon" required under the authority for the "acquisition and development of plants, factories, and establishments for the manufacture of aeroplanes, aircrafts, etc." Similarly, the Act of October 6, 1917 (Pub. No. 64, 65th Cong. [40 Stat. 345]), confers authority under the Ordnance Department for the acquisition of storage facilities, etc. The Act of August 1, 1888 (25 Stat. 357 [Comp. St. 1916, § 6909]), authorizes the acquisition by condemnation proceedings as prescribed therein, where any officer of the Government is "authorized to procure real estate for the erection of a public building or for other public uses." It will be seen that the Act of July 2, 1917, is limited to the purposes specified therein; i. e., to lands required "for fortification, coast defense and military training camps;" and that where the required lands are needed for other purposes, authority, if any, for their acquisition must be found in other statutes; and that unless they can be acquired by purchase, condemnation thereof, where there is authority to acquire the lands, is authorized by the said Act of August 1, 1888.

[Signed] E. H. Crowder, Judge Advocate General.

19. STOPPAGE OF GROUP PAY FOR TORTS

Articles of War LIV.

4th Ind.

War Department, J. A. G. O., February 15, 1918.—To the Adjutant General.

1. By the preceding indorsement there is referred to this office for remark a claim growing out of certain damages to the crops of Mr. G. N. Stedman of Spartanburg, South Carolina, inflicted by certain unknown members of the military forces at Camp Wadsworth.

2. By the papers in reference it appears that the claim was inves-

tigated by a board of officers appointed by the commanding general of the 27th division. The board found that Mr. Stedman's farm had been damaged to some extent by certain soldiers attached to Camp Wadsworth, but concluded that there was no definite proof of the extent of the damages, nor of the identity of the soldiers, who caused it, nor of the organization to which they belonged. Mr. Stedman claimed that the damages amount to \$29.

3. It does not appear how the farm or the growing crops were damaged. In fact, there is an absence of particulars in this most important aspect of the question. It cannot, therefore, be stated whether the damages claimed were the result of unnecessary or willful trespass or whether it was the result of some careless or ordinary act connected with some necessary procedure for the betterment of camp conditions.

4. The rule is well settled that the United States cannot be held responsible for the torts of its officers or agents. Responsibility, if any, in such cases rests upon the individual or the individuals whose negligence or wrongful act or acts, caused the damages (Dig. Op. 1912, p. 242).

5. But wherever a complaint is made that the damages are caused by the tortious or criminal acts of persons subject to military law, then under the 105th Article of War (Comp. St. 1916, § 2308a), where the personal liability of any such person is established, provision is made for deductions sufficient to satisfy any such complaint; and it is further provided in the second and last paragraph of said Article 105, that:

"Where the offenders can not be ascertained, but the organization or detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization or detachment at the time the damages complained of were inflicted as determined by the approved findings of the board."

So, where the organization or detachment to which the offenders belonged is known, then the damages may be proportionately assessed as is deemed just and equitable against the members of the detachment. And while it is stated that the organization to which the offenders, causing these damages, belonged is not known, it does appear from the findings of the board that the damages were inflicted "to some extent by certain soldiers attached to Camp Wadsworth." Therefore, it is pertinent to inquire: Is Camp Wadsworth a detachment? Obviously, it is.

6. It is the opinion of this office that no compensation can be made by the Government to Mr. Stedman for the injury in question, but relief may be obtained by and through the commanding officer at Camp Wadsworth, agreeable to the procedure required and provided for in the 105th Article of War, and especially the last paragraph thereof, to which attention has been here specifically invited.

[Signed] S. T. Ansell, Acting Judge Advocate General.

20. WAR DEPARTMENT DISPOSAL OF UNITED STATES PROPERTY
BY GIFT*Public Property IX 2.*

AGO 400.701 (Misc. Div.) 3d Ind.

War Department, J. A. G. O., February 19, 1918.—To the Adjutant General.

1. The subject under consideration in these papers is the transfer to the town of Eagle, Alaska, of certain old water pipe on the Military Reservation at Fort Egbert, which appears to have been discarded some years ago as being of no further use, the same having been split through freezing. This pipe is desired by the town for use as posts for fencing a plot of ground which has been set aside for a cemetery for the town. The matter was taken up by the Clerk of the Common Council of the town on December 31st last with the Quartermaster at Fort Gibbon and also with the delegate representing Alaska in Congress, Hon. Charles A. Sulzer, and by Mr. Sulzer submitted to the Quartermaster General, who recommends that authority be given by wire for the proposed transfer, provided there is no legal objection thereto. The views of this office are desired as to whether the transfer can legally be made.

2. The power to dispose of the property of the United States is granted by the Constitution to Congress and it is well settled that this power relates both to the real and personal property of the Government and embraces also any form of disposition thereof, either by sale, by donation, or by any other means. Congress, by section 1241 of the Revised Statutes (Comp. St. 1916, § 1972), has authorized the disposition of military stores which would include the property under consideration, under the following conditions:

"The President may cause to be sold, any military stores which, upon proper inspection or survey, appear to be damaged or unsuitable for public service. Such inspection or surveys shall be made by officers designated by the Secretary of War, and the sales shall be made under regulations prescribed by him."

Under the authority of this section the following regulations have been promulgated by the Secretary of War providing for the sale of the military stores and public property under his control:

"Military stores and public property condemned and ordered sold will be disposed of for cash at auction, or to the highest bidder on sealed proposals, on due public notice, and in such market as the public interests may require." * * * (A. R. 1913, par. 680.)

3. The War Department is clearly without authority under the law to transfer or donate to the town of Eagle this damaged pipe; and, moreover, it would appear that the only method by which the town can acquire it is through its sale in accordance with the above paragraph of the Army Regulations and its purchase by the town after it has been inspected as required by law and found to be damaged or unsuitable for the public service.

[Signed] S. T. Ansell, Acting Judge Advocate General.

21. SOLDIER'S RIGHT TO INNKEEPER'S SERVICES

February 27, 1918.

1. By the papers in reference is submitted primarily a request for general information rather than a proposition involving legal questions. The question asked is: "Kindly advise if there are any hotels in the United States to which privates of either the Army or Navy in uniforms are not allowed admittance."

There is no Federal law bearing directly upon this subject, except the Act of March 1, 1911 (36 Stat. 963 [Comp. St. 1916, § 10496]), which punishes any proprietor, manager, or employee of a theatre or other place of entertainment or amusement in the District of Columbia or in any territory, the District of Alaska or the insular possessions of the United States who makes or causes any discrimination against persons wearing the uniform of the United States Army, Navy, Revenue Cutter Service or Marine Corps. There are laws in many states of this country prohibiting discriminations against the uniform, but there is no Federal law which prohibits discrimination against persons wearing the uniform in so far as innkeepers are concerned.

2. The State of Virginia passed a law, approved March 21, 1916, prohibiting discrimination by common carriers, innkeepers, proprietors or lessees of any place of public amusement against persons lawfully wearing the uniform of the military service of the State or the United States. There are similar laws in other states, not necessary to be particularly enumerated in this connection. Their purport is the same and they should be consulted whenever this or a similar question arises in their respective jurisdictions.

3. At common law an innkeeper is obliged to receive all travellers who properly apply for admission, provided he has accommodation and the person so applying pays or is capable of paying reasonable charges for his entertainment. The rule is in fact even well settled that a guest must tender the price in advance if such is demanded. This obligation to serve the public attaches to everyone professing the trade of an innkeeper, but when his accommodations are exhausted, necessarily he may refuse to receive a traveller or applicant as a guest.

Whether an innkeeper is justified in refusing to receive a traveller or in denying entertainment to a guest, so applying for accommodation, is a question of fact dependent always upon the circumstance of each particular case. It has been broadly stated that an innkeeper is justified in refusing entertainment to a guest, if it would injure his business to admit him to his house. It is doubtless true that an innkeeper would be justified in excluding any one who is or would be reasonably objectionable.

4. Again, at the common law, since inns are for the convenience of the public, and because the proprietors thereof are granted special privileges in return for public convenience, an indictment lies against an innkeeper who refuses to receive a guest, and whether or not such refusal was reasonably justified is always a defensive question of fact dependent upon the circumstances. A citizen in uniform does not thereby lose his right to become a guest and the question is specifically presented, would an innkeeper, other things being equal, be justified in

refusing entertainment and accommodation to an applicant for such, merely because he was clothed in the uniform of his country. Certainly not. No local or organized prejudice could justify an innkeeper in taking such a position. To say the least, such an attitude would have its rise in disloyalty or snobbery, and would, without question, tend to incite a breach of the peace or other public disorder. Therefore, irrespective of the question whether states have enacted legislation bearing directly upon this question, an innkeeper refusing admission to a person otherwise entitled to be received as a guest solely upon the ground that he wore the uniform of the United States, would subject himself or herself to prosecution by way of indictment or information in all the States of the Union where the common law was adopted, and has not been modified in this respect by statute.

5. In the opinion of this office, there would be no reasonable justification for excluding a person as a guest merely because he wore the uniform of the Army or the Navy of the United States. If such person was objectionable for other and different reasons, then any such exclusion would be independent of the question of the uniform. That is, a person otherwise objectionable would not be entitled to be entertained as a guest merely because he wore the uniform of the Army or the Navy. But an innkeeper who, when he has room, refuses to receive and duly entertain a member, in uniform, of the Military or Naval forces of the United States, who tenders a reasonable price for such entertainment, is subject to indictment and should be vigorously prosecuted.

As to whether there are any hotels in the United States to which privates of either the Army or the Navy in uniform are denied admittance, this office is not advised and therefore expresses no opinion.

[Signed] S. T. Ansell, Acting Judge Advocate General.

22. CANCELLATION OF CONTRACT FOR HARDSHIP TO CONTRACTOR *Contracts VII.*

AGO 464, Misc. Div.

2d Ind.

War Department, J. A. G. O., February 27, 1918.—To the
Adjutant General.

1. Under date of February 4, 1918, this office rendered an opinion with reference to the cancellation of the contract dated August 24, 1917, with the Cincinnati Grain & Hay Company for the delivery, subject to increase or decrease of 20%, of 1,000,000 lbs. of Timothy hay and 200,000 lbs. of wheat straw, f. o. b. cars, Camp McClellan, Aniston, Ala., during the period commencing September 2, 1917, and ending November 24, 1917. The Government exercised its option to increase the quantity of hay specified in the contract by 20%, making the total of 1,200,000 lbs., of which amount 415,975 lbs. have been furnished, leaving a balance of 784,025 lbs. to be delivered. The contract has been performed as to the straw.

2. In said report this office considered the claims that the contractor was entitled to relief on the ground that the camp quartermaster did

not call for deliveries of proportionate quantities during the early part of the contract period, and that the railway conditions obtaining during the latter part of the period were such as to make performance within the contract period impossible. It appears that the contractor immediately after entering into the contract placed orders for hay to cover the contract with responsible people in Michigan, notifying them that it was for the Government camps; and that by reason of the inability of the contractor to secure equipment for the transportation of the hay to the camps, the people with whom the orders were placed did not fill the same—the price of the hay having in the meantime materially advanced. It was claimed that the Government should have furnished them the equipment for shipping the hay, and that because of this failure on the part of the Government they should be released from their obligation to fill their contract with the Government. This office, in its report, said:

"There is nothing in the contract requiring the Government to furnish the contractors with the equipment to ship the hay, but on the contrary, the contract places the obligation on the contractor to furnish the hay 'delivered f. o. b. cars, Camp McClellan, Anniston, Alabama, in such quantities and at such times as may be named by the Government.' Moreover, the contract does not specify the place from which the hay was to be procured, and it was up to the contractors to procure the hay where and under such conditions as would enable them to fill their contract. It is, therefore, the opinion of this office that the inability of the contractors to procure cars at the country points in Michigan where they claim to have procured the hay, furnished no legal ground for relief and that their request for the cancellation of their contract cannot legally be complied with."

3. There is now submitted a brief of Mr. Ware, attorney for the Cincinnati Grain & Hay Company, through the Honorable A. B. Rouse, M. C., in which he urges that the conditions obtaining during the period of performance of this contract constituted such a national crisis that the War Department should "abandon any hard, fast and technical rules of law and decide this matter upon its merits and afford the contractor a just and equitable adjustment under his contract." It is claimed, and it may be conceded, that the contractors acted with due diligence, doing everything in their power to obtain the equipment necessary to fill their contracts; but, in view of the fact that their contract bound them, without qualifications, to furnish the required quantity of hay, without specifying where it should be procured, the conditions relied upon constitute no legal ground for their relief. It is not believed that the conditions obtaining would have given them legal right to relief if the contract had been made with a private party, and the construction of the contract cannot be different because it is made with the Government. So far as the appeal is made to the War Department on ground of hardship, referred to as equitable grounds, the Department is without authority to give relief on any such ground, it being well settled that the Department cannot relieve contractors on grounds other than legal. Where relief is sought for on the ground of hardship, the application should be made to Congress and not to the War Department. This office must, therefore, adhere to the views ex-

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pressed in its previous reports of February 4, 1918, copies of which are with the papers in reference, to the effect that the Department is without authority to grant these contractors the relief desired.

[Signed] S. T. Ansell, Acting Judge Advocate General.

23. CONTRACT CLAUSES AS TO INFRINGEMENT OF PATENT RIGHTS

February 28, 1918.

Memorandum for the Aircraft Board.

Subject: Infringements of patents.

1. In your communication dated February 27, 1918, you request the advice of this office as to the proper course of procedure with regard to claims that the Government is infringing patents through contracts for aeronautical equipment. You say:

"For your consideration I would say that many of the contracts call for the manufacture of mechanical devices according to specifications furnished by the Signal Corps; and that frequently the contracts have contained clauses indemnifying the contractor for patent infringements."

2. In the opinion of this office the proper procedure with reference to claims for infringement of patents depends upon varying conditions, which may be presented, as follows:

(a) Where a contract is made for the manufacture of a patented device with a contractor claiming the right to make and dispose of such article, the practice of the War Department is to require the contractor supplying the article to stipulate in the contract to indemnify the United States against the claims of all parties for the infringement of their patent rights. The Act of June 25, 1910 (36 Stat. 851 [Comp. St. 1916, § 9465]) gives to the owners of inventions covered by patents of the United States the right to sue the United States in the Court of Claims whenever such invention shall, after the passage of the act, "be used by the United States without license of the owners thereof or lawful right to use the same," excepting from the benefits of the act patents discovered or invented by the employees of the Government during their employment or service, etc. Should the United States be sued under authority of this statute for infringement, the contractors could be called on to defend the suit, and if the result of the suit should be adverse to the United States, they would be bound by such result in respect to the claim of the United States for indemnity under the terms of their contracts. It will be apparent that in procuring patented articles or supplies from persons who have patents from the United States covering the same, and have, therefore, a prima facie right to make and sell the same, the Department cannot undertake to pass upon the claims of third parties that the articles or supplies proposed to be furnished to the United States infringes patents granted to them; but that the proper course is to protect the interests of the United States by the stipulation hereinbefore referred to—leaving the conflicting claims to settlement in the courts, either between the respective claimants, or in a suit against the United States under the authority conferred by the said Act of June 25, 1910. It

will be further apparent that should the Department undertake to adjudicate the question in favor of the party claiming that his patent rights are infringed, and make settlement accordingly, such action would not conclude the party who furnished the supplies to the Government in respect to the stipulation of such party to indemnify the United States.

(b) With regard to contracts calling for the manufacture of mechanical devices according to Government specifications, the situation is entirely different. Here, the contractor does not claim the ownership and control of a patent covering the device, but is merely manufacturing it according to Government specifications. It will be apparent that the provision that the contractor should indemnify the Government would have to be omitted from such a contract and, indeed, it would be entirely proper to insert in such a contract a provision that the Government would indemnify the contractor with respect to claims of owners of patents for infringement arising out of the execution of the Government contract. It was held by this office, in an opinion dated April 8, 1912, that such a provision might be inserted in a contract covering the manufacture of field baking ovens manufactured according to Government specifications (C. 25188, April 8, 1912). The Act of June 25, 1910, *supra*, discussed in the preceding paragraph, clearly gives, by implication, the right to manufacture or have manufactured for Government use any supplies covered by letters patent, giving, as it does, to the claimant the right to sue in the Court of Claims for a reasonable compensation for such use. Where a suit is brought against the contractor based upon the performance of the contract, notice should be given to the proper Department and a request made upon the Department of Justice to have the suit defended by the United States. Where claims are submitted to the Department by the owners of the patent, particularly if the claim is a doubtful one, the proper action to take with respect thereto, would be to decline to consider the claim on the ground that the Department is not equipped with the means to satisfactorily determine it, and that the claimant has a remedy in the courts. • Where, however, the right of the claimant to a patent is clear and a contract can be made with the claimant for the purchase of the patent right, or for a license to manufacture and use the article for Government purposes, for a reasonable consideration, there would be no legal objection to such a contract with the claimant. The Act of June 25, 1910, has been construed by this office in a number of opinions as simply withholding the remedy provided therein, and as not affecting the prior state of the law with respect to patents invented by officers or employees of the United States. In the case of *Crozier v. Fried. Krupp Aktiengesellschaft*, 224 U. S. 290, 32 Sup. Ct. 488, 56 L. Ed. 771, the court after stating that prior to this enactment the power to sue the United States for redress for the infringement of a patent right "did not obtain unless from the proof it was established that the contract to pay could be implied—that is to say, that no right of action existed against the United States for a mere act of wrongdoing by its officers," said that the intention of the statute, as indicated in the title, was to create a remedy for this condition by giving claimants the right to sue in the Court of Claims. The court says:

"That is to say, it adds to the right to sue the United States in the Court of Claims already conferred when contract relations exist the right to sue even although no element of contract is present. * * * In substance, therefore, in this case, in view of the public nature of the subjects with which the patents in question are concerned and the undoubted authority of the United States as to such subjects to exert the power of eminent domain, the statute, looking at the substance of things, provides for the appropriation of a license to use the inventions, the appropriation thus made being sanctioned by the means of compensation for which the statute provides."

(c) Where an order is placed with a manufacturer under section 120, Act of June 3, 1916 (39 Stat. 213 [Comp. St. 1916, § 3115g]), for the manufacture of a mechanical device according to Government specifications, since the manufacturer is under a legal compulsion to comply with the order, no formal stipulation would be necessary to indemnify the manufacturer with respect to claims of owners of patents covering the device. The manufacturer could plead such legal compulsion by way of defense to any suit by the owners of the patents, and such owners would be remitted to the remedy given them by the Act of June 25, 1910, *supra*. Here, as in the preceding paragraph, where the right of the claimant to the patent is clear, and it is deemed to the interest of the Government, a contract may be made with the owner of the patent covering the right to manufacture or have manufactured the patented device for the uses of the Government.

3. It may be added that it was held by the Supreme Court in the case of *Crozier v. Krupp*, *supra*, that no injunction would lie against any officer of the United States in respect to the manufacture or use for the Government of a patented invention, the law having provided a method whereby the owner may obtain compensation.

[Signed] E. H. Crowder, Judge Advocate General.

24. CIVILIAN CLAIM FOR DAMAGE DONE BY SOLDIERS

Articles of War LIV.

4th Ind.

War Department, J. A. G. O., March 5, 1918.—To the Adjutant General.

1. Returned. The papers in reference relate to a claim of Mr. Lemly, a civilian, against Private C. V. Goldman, Battery A, 140th Field Artillery, for damages alleged to have been done to a Ford truck on December 28, 1917, at Jackson, Mississippi. On January 4, 1918, a board consisting of Lieutenants J. A. Ellard, H. E. Stephenson and C. W. Crisler, was appointed to investigate and fix the amount of damage. The board sat, took evidence, and fixed the amount of damages at \$15, to be paid to the claimant out of the pay of the soldier. The claimant was dissatisfied with the award and addressed a letter to the Adjutant General of the Army requesting that a new board be appointed to make a re-examination. The Division Inspector of the 39th Division was thereupon directed to and did make an investigation, and

under date of February 8, 1918, submitted his report with the following recommendation:

"It is my opinion that the action of the board was made after careful and conscientious consideration of all evidence available, but that Mr. Lemly will not receive sufficient compensation to replace the parts broken by the act of Pvt. Goldman. It is recommended that another board be convened to investigate this case and determine what damages should be paid Mr. Lemly by Pvt. C. V. Goldman, Battery A, 140th F. A."

The Commanding General of the 39th Division has approved the report and recommendation of the division inspector by the second indorsement, *supra*.

2. The 105th Article of War (Comp. St. 1916, § 2308a) provides that a board may be convened by the commanding officer when complaint has been made to him that damage has been done to property by a person subject to military law. The proceeding is initiated by the claimant, who thereby invokes the remedies provided by this Article for the ascertainment and payment of the damages which he claims to have sustained.

In the present case the claimant, Mr. Lemly, made complaint and filed a claim for damages. Based thereon a board of three officers was convened in the usual manner to investigate the claim and assess the damages, if any. The record discloses, and the division inspector found, that the board was convened, made a careful, conscientious consideration of the case, and reached a conclusion upon the evidence submitted. There is no suggestion that it proceeded improperly, unlawfully, or failed to give the case a fair and impartial consideration.

3. The due and orderly administration of law, both civil and military, requires that controversies should be settled promptly, and that when a matter in controversy has been once tried and decided by a competent and impartial tribunal, proceeding in a lawful manner, its decision should be considered as final, and the litigation ended. The mere fact that one or the other party to the controversy feels himself aggrieved by the result should not be sufficient reason for a re-examination of the dispute. If it were otherwise there would be no end to the matter.

In the present case there is nothing in the record impeaching the fairness or legal competency of the persons who sat on the board, and it is conceded that their decision was the result of a full and careful consideration of all the pertinent facts.

4. In view of what has been said, this office recommended that the findings of the board convened to act upon the claim presented by Mr. Lemly be considered and acted upon as the final disposition of the case.

[Signed] S. T. Ansell, Acting Judge Advocate General.

25. JURISDICTION OF OFFENSE BY SELECTIVE EN ROUTE TO CAMP
Discipline—Articles of War LIX.

March 6, 1918.

From: The Office of the Judge Advocate General.

To: Chief, Military Intelligence Branch, Executive Division.

Subject: Prosecution of drafted men for offenses committed en route to mobilization camps.

1. In your communication of February 25, 1918, you ask whether the civil authorities should be permitted to prosecute a person who has been drafted into the service, and who commits a civil offense after having been ordered to report to the mobilization camp.

2. A man who has been inducted into the military service and ordered to report to a mobilization camp is subject to military jurisdiction. *U. S. ex rel. Koopowitz v. Finley* (D. C.) 245 Fed. 871; *Franke v. Murray* (C. C. A.) 248 Fed. 865, decided February 14, 1918, by the Circuit Court of Appeals of the United States for the Eighth Circuit. The military jurisdiction is as complete in this case as in that of a soldier who has already entered the mobilization camp. No distinction therefore should be made in respect to the policy which should be pursued in his case and that of the soldier who is with his command when the civil offense is committed. The military authorities having a paramount right to his custody, the civil authorities should not arrest and hold him for the civil offense while he is in the act of reporting to the mobilization camp.

If, however, the civil offense committed by him is of a serious character, such as a common law felony, upon application by the civil authorities for the surrender of the man, accompanied by a statement of the offense, preferably in the form of a copy of the charge or indictment, with a citation of the statute under which it was returned, and a summary of the evidence relied upon to sustain the charge, the man will be turned over to the civil authorities for trial. The refusal, however, of the military authorities to deliver a soldier who has committed a civil offense to the civil authorities will not operate to relieve him from punishment, since the military authorities have jurisdiction and may take cognizance of the civil offense and punish the offender.

[Signed] S. T. Ansell, Acting Judge Advocate General.

26. TRANSFER OR SALE OF UNITED STATES PROPERTY FROM ONE
BUREAU TO ANOTHER
Public Property I B.

4th Ind.

War Department, J. A. G. O., March 25, 1918.—To the Adjutant General.

1. By the preceding indorsement is submitted the question whether six unserviceable horses belonging to the War Department, now at Ft. Myer, Va., and which have become incapacitated for the kind of work usually required of them, can be legally transferred, without reim-

bursement, to the Bureau of Plant Industry, Department of Agriculture.

2. By the papers in reference it appears that these animals could be used by the Bureau of Plant Industry for light work, and it is recommended by the Acting Quartermaster General that they be transferred, if not in conflict with any law or regulation relating thereto.

In a long line of decisions this office has held that where the property desired to be transferred is no longer needed for the purpose for which appropriated, it may be, without the consent of Congress, transferred to another department. These decisions turn upon the principle that a transfer is not a sale, and as the government does not thereby part with its title, the objection could not be urged that public property had been disposed of without the authority of Congress.

3. It may serve a good purpose to refer to several of the decisions of this office holding that where the property was no longer needed for the purposes for which it was appropriated it could be legally transferred. It was held, March 14, 1900 (C. 7840), that certain cooking utensils, table ware and soap purchased from a river and harbor appropriation to be used in connection with the improvement of the rivers and harbors of Florida, could be turned over to an officer for use in connection with a river and harbor improvement in Georgia: it was further held (April 25, 1901, c. 10300) that five mules purchased in connection with certain harbor improvements in Alabama could be transferred to the Quartermaster Department of the Army; on the 26th of November, 1897 (C. 3679), it was ruled that a sail boat in the possession of the United States Engineer office at San Juan could be transferred to the Light House Board; on the 29th of April, 1901 (C. 10,315), it was held proper to exchange a Remington typewriter, in possession of the Chattanooga National Park Commission, for a Smith Premier belonging to the Quartermaster Department. And it has been likewise held that a cable laid between Narragansett Pier and Block Island could be properly transferred to the Weather Bureau, Department of Agriculture; and that certain property belonging to the Medical Department of the United States Army, which had been condemned and ordered to be destroyed, could be properly transferred to the Forest Service of the Department of Agriculture. These citations are sufficient to illustrate the recognized rule that the transfer of public property from one bureau or department to another is not regarded as a sale; and that where the property desired to be transferred is no longer fit for the purposes for which it was originally purchased, there is no objection to transferring it to another bureau or executive department without first obtaining the consent of Congress.

4. It is the opinion of this office that the six unserviceable horses now in the possession of the War Department at Fort Myer, Va., can be properly transferred without reimbursement, to the Bureau of Plant Industry, Department of Agriculture.

[Signed] S. T. Ansell, Acting Judge Advocate General.

27. ACCRUAL OF WAR RISK BENEFITS FOR INDUCTED MEN

4th Ind.

War Department, J. A. G. O., March 26, 1918.—To the Adjutant General.

1. The opinion of this office is asked upon a suggestion made by the Commanding General, 85th Division, Camp Custer, Michigan, to the effect that the obligations and benefits of the War Risk Insurance Act with reference to allotments and insurance should not accrue to drafted men until they have been physically examined at camp and accepted for service. The second indorsement by the Bureau of War Risk Insurance holds this suggestion to be contrary to the provisions of the War Risk Insurance Act (40 Stat. 398).

2. By the terms of the 2d Article of War (Comp. St. 1916, § 2308a), of section 2 of the Selective Draft Act (40 Stat. 76, 78), and of section 157 of the Selective Service Regulations, drafted men are in the military service from the dates they are required by the terms of the order directing them to report for military service to obey the same. *Franke v. Murray* [C. C. A.] 248 Fed. 865, Bulletin 62, Interpretation of War Statutes. After they have been duly examined and passed as qualified for military service, have been ordered by the local board to report for military service at a designated camp, and have actually reported pursuant to such order, they are in active service within the meaning of the War Risk Insurance Act, and are, consequently, entitled to all of its benefits and subject to all of its obligations. So long as they are in such service, they must make such allotments as are required by the terms of article 2 of the Act. If they apply for insurance pursuant to article 4 of the Act and the regulations thereunder, they are entitled to have it granted; and separation from the service thereafter will not invalidate their policies so long as they comply with the terms thereof.

[Signed] S. T. Ansell, Acting Judge Advocate General.

28. MILITARY JURISDICTION OF CIVILIAN EMPLOYEES

Discipline VIII G 2.

April 3, 1918.

From: The Office of the Judge Advocate General.

To: The Judge Advocate, Port of Embarkation, Hoboken, N. J.

Subject: Military jurisdiction of civilian employees.

1. The question presented is whether the military authorities have jurisdiction to try by court-martial a civilian employee at the Port of Embarkation who has committed a theft of government military stores. From the statements contained in your telegraphic communication of the 25th, supplemented by your letter of the 26th ultimo, it appears that William Norwood lives at 339 Gold Street, Brooklyn, N. Y., outside the limits of the Port of Embarkation; that on the afternoon of March 23, 1918, and prior thereto, he was a civilian employee of the Quartermaster Department at the Port of Embarkation,

having accepted voluntary employment as a laborer on the docks, presumably in connection with the handling and loading of military supplies for shipment along the line of communication to the theatre of actual hostilities in France. On the afternoon of March 23d he was apprehended while attempting to steal an army uniform and was taken into custody by the military authorities.

2. This office will take notice that the Bush Terminal, where Norwood was employed at the time of the alleged attempt at theft, is within the limits of the Port of Embarkation, at Hoboken, N. J.; that it is under the control of and is being operated by the Government having been commandeered for that purpose; that it is one of the termini of the lines of communication reaching from the Atlantic seaboard to the zone of war in Europe, where our Expeditionary Forces are engaged in actual warfare along the Western Front; and that this terminal is used by the military authorities as a base at which to assemble troops, munitions and military supplies generally, to be forwarded directly along the lines of communication to the Expeditionary Forces carrying on offensive and defensive military operations in Europe. Manifestly, Norwood was employed under a voluntary contract by the military authorities to work at this terminal in connection with the handling of the military supplies there assembled for that purpose. The question is, upon these facts, is a person subject to military law?

3. Subdivision (d) of the 2d Article of War (Comp. St. 1916, § 2308a) makes subject to military law "all retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, or, in time of war, all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles."

Obviously, an army in the field must be supplied with troops, munitions, food, clothing, and other supplies from bases previously established and maintained. As a part of the operations in the field, the line of communication from these bases of supplies to the fighting front must be kept open and supplies assembled at the bases forwarded as necessity arises. The operation of the line of communication stretching from the bases of supplies to the battlefield is as essential as maintaining troops along the fighting line, and, indeed, the latter depends wholly upon the former. It cannot be well asserted that those who serve along the line of communication are not serving with the army in the field; and these lines must necessarily include the bases and extend thence to the zone of actual warfare. If an army were engaged in combat and supplies of necessary troops, food, clothing, etc., were assembled back of the line a distance of ten, fifteen, twenty-five or fifty miles, it would not be contended that those who served at the base and those who served on the line from the base to the battle front were not serving with the army in the field, and the application of the principle cannot be made to depend upon the length of line, it being once established, as in the present case, that the base is a part of the line of communication which supplies our troops in France.

4. This view is in harmony with earlier opinions of this office. In an opinion under date of December 11, 1917, this office dealt with the case of Charles W. Blake, Master of the U. S. A. Chartered Transport Teresa. He was charged with, and convicted of, failing to obey orders received from the Commanding General at the Port of Embarkation, Newport News, on September 21, 1917, concerning the sailing of his ship. The ship was not owned by the Government but was merely chartered. The ship was in the Port of Embarkation, Newport News, at the time. It was engaged to carry military supplies from that point along the line of communication to France. The master was not employed by the United States. Nevertheless, it was held that, within the meaning of the provisions of the 2d Article of War quoted, *supra*, he was serving with the armies in the field and was subject to military law.

The case of Charles E. Gerlack involved construction of these provisions. Gerlack went to Europe as mate on the S. S. McClellan, used as a military transport. He was there discharged and sent back on the army transport El Occidente. While the latter ship was in the danger zone near the Azores, Gerlack refused to take a lookout and to assist in safeguarding the ship. He was tried for disobedience of orders, convicted by a general court-martial, and sentenced to a term of confinement, the United States Disciplinary Barracks, Fort Leavenworth, Kansas, being designated as the place of confinement. After conviction he made application for a writ of habeas corpus to the United States District Court for the Southern District of New York. The court held that he was subject to military law and dismissed the writ.

5. In the opinion of this office, Norwood, at the time of the alleged attempt at theft, was a person subject to military law and his offense is within the jurisdiction of a court-martial.

Whether or not jurisdiction should be asserted in this case is a question of administrative expediency. If the civil authorities should proceed in the case and make proper application for his surrender to them for trial for his alleged offense, such application should be given consideration in accordance with the policy heretofore announced by the War Department with respect to the surrender to the civil authorities for trial of persons subject to military law, accused of civil offenses.

[Signed] E. H. Crowder, Judge Advocate General.

29. DISCHARGE OF REGULAR ARMY OFFICER TEMPORARILY PROMOTED

Office IV E 2.

April 9, 1918.

Memorandum for the Adjutant General.

1. The question presented is whether an officer of the Regular Army who has been given a temporary promotion in the Regular Army under section 8 of the Selective Draft Act of May 18, 1917 (40 Stat. 76), can be discharged from this office under section 9 of the same act, the statute requiring such promotions to be confirmed by the Senate.

2. The pertinent parts of section 8, Selective Draft Act of May 18, 1917 (40 Stat. 76, 81), provides:

"Vacancies in all grades in the Regular Army resulting from the appointment of the officers thereof to higher grades in the forces other than the Regular Army herein provided for shall be filled by temporary promotions and appointments in the manner prescribed for filling temporary vacancies by section 114 of the National Defense Act, approved June 3, 1916."

Section 114, National Defense Act of June 3, 1916 (39 Stat. 166, 211 [Comp. St. 1916, § 1908a]), in pertinent part provides:

"That officers temporarily promoted or appointed under the terms of this section shall be promoted or appointed by the President by and with the advice of the Senate for terms that shall not extend beyond the war or the passing of the emergency for which additional forces were brought into the military service of the United States and at the termination of the war or the passing of the emergency, said officers shall be discharged from the positions held by them under their temporary commissions or appointments."

Section 9, Selective Draft Act, *supra*, in pertinent part, provides:

"That the appointments authorized and made as provided by the second, third, fourth, fifth, sixth, and seventh paragraphs of section one and by section eight of this act and the temporary appointments in the Regular Army authorized by the first paragraph of section one of this act, shall be for the period of the emergency unless sooner terminated by discharge or otherwise. The President is hereby authorized to discharge any officer from the office held by him under such appointment for any cause which, in the judgment of the President, would promote the public service. * * *"

3. In considering the foregoing provisions the rule of construction that a statute must be construed with reference to its leading idea and purpose; that it is passed as a whole and not in sections and is animated by one general purpose and intent which must not be lost sight of; and that each part or section must be construed in connection with every other part or section so as to produce a harmonious whole, must be adopted. Lewis' Sutherland, *Statutory Construction*, 568.

4. The leading idea and purpose of the Selective Draft Act of May 18, 1917, *supra*, is to increase temporarily the military establishment of the United States and to give the President the greatest freedom of action in its organization and the appointment and removal of its officers. The Act contains 14 sections and with the exception of sections 10, 11, 13 and 14 each section in express terms confers power upon the President looking to the single end, that is, the greatest freedom of action to raise, organize, equip and officer the temporary military forces of the United States.

5. Paragraph 1, section 1, *Id.*, authorizes the President to terminate provisional appointments whenever it is determined in a manner to be prescribed by him that an officer has not suitable fitness for permanent appointment. Section 9, *Id.*, provides that the appointments authorized and made as provided for in the remaining paragraphs of section 1 and section 8, *Id.*, shall be for the period of the emergency

unless sooner terminated by discharge or otherwise and gives the President authority to discharge any officer from the office held by him under such appointment for any cause which in the judgment of the President will promote the public service. The tenure of office of officers who are temporarily promoted in the Regular Army to the vacancies occasioned by the appointment of officers of higher grades in the Regular Army office in the other forces, is for the period of the war or the passing of the present emergency and is in effect the same tenure as that of regular officers appointed in the temporary forces whose places in the Regular Army they are promoted to fill. The President is given express authority to discharge any officer from the office held by him under temporary appointment, although officers up to the grade of colonel are appointed by the President alone and officers above the grade of colonel are appointed by the President by and with the advice of the Senate. Did Congress intend to make a distinction between officers of the Regular Army thus promoted and the officers appointed or is the word "appointment" as used in section 9, *Id.*, broad enough to include officers temporarily promoted? No reason suggests itself why any officer of the Regular Army temporarily promoted therein should not be discharged in the same manner that an officer of the same force temporarily appointed to an office in the additional forces. The purpose of the Act is furthered by the inclusion and it requires no strained construction of the word "appointment" to include them.

6. The word "appoint" has been defined "to designate, ordain, prescribe, nominate." *People v. Fitzsimmons*, 68 N. Y. 514.

"A promotion in the army is an appointment to a higher office therein. The custom so far as I am aware is to nominate the promoted officer to the Senate and subsequently to appoint and commission him anew." 30 Op. Atty. Gen. 180.

These definitions are in harmony with the spirit of the Act and give the President the power that was clearly contemplated by Congress. To adopt a narrower construction of the word "appointment" and to hold that it does not include an officer temporarily promoted to vacancies in the Regular Army will deny the President this power and will lead to anomalous situations. For instance, a Major of the Regular Army is appointed a Colonel in the National Army and the senior Captain in the Regular Army is promoted to temporary Major in the Regular Army. The President terminates the Regular Army Major's commission as Colonel in the National Army and he reverts to his status as Major in the Regular Army. It is then necessary to terminate the commission of the Captain who holds the temporary commission as Major. The tenure of his temporary commission as Major is the period of the war or the passing of the emergency. Unless the President has the power under section 9, *Id.*, to discharge him, how is his office terminated?

Having regard to the manifest object of the Act and of the rule of construction that "the natural import of words is their literal sense but this may be greatly varied to give effect to the fundamental purpose of the statute." *Lewis' Sutherland, Statutory Construction*, 374, it is believed that the word "appointment" as used in section 9, *Id.*,

can properly be construed to include officers temporarily promoted and it follows that the President can discharge such officers under the provisions of that section.

7. This conclusion is strengthened by the fact that as an incident to his power to appoint, the President has power to discharge military officers (4 Op. Atty. Gen. 1-603; 6 Op. Atty. Gen. 4; 8 Op. Atty. Gen. 233-288; 15 Op. Atty. Gen. 421; *Blake v. United States*, 103 U. S. 236, 26 L. Ed. 462), and "In the absence of constitutional or statutory provisions the President can, by virtue of his general power of appointment, remove an officer even though he was appointed by and with the consent of the Senate" (*Shurtleff v. United States*, 189 U. S. 311, 23 Sup. Ct. 535, 47 L. Ed. 828). This office in considering this power held:

"The power to dismiss, which, as being an incident to the power to appoint public officers, had been regarded since 1789 as vested in the President by the Constitution, was, for the first time in 1866 (by the act of July 13 of that year, reenacted in the second clause of the present ninety-ninth (118) Article of War [Comp. St. 1916, § 2308a] and in section 1229, R. S. [Comp. St. 1916, § 2001]) expressly divested by Congress in so far as respects its exercise in time of peace. By the statute law it is now authorized only in time of war. C. 13323, Sept. 18, 1902; 13654, Nov. 13, 1902; Dig. Op. J. A. G. 1912, p. 819.

8. There being no limitation upon the inherent power of the President to dismiss or discharge an officer in time of war, has an officer of the Regular Army who has been temporarily promoted and is discharged from his temporary commission a right to a court-martial under section 1230, R. S. (Comp. St. 1916, § 2003)?

9. If the word "dismiss" used in section 1230, R. S., is given its usual definition, any officer discharged from the National Army, the National Guard, or temporary appointments or promotions, could demand a court-martial unless this section has been repealed by implication or is applicable only to the Regular Army. It is manifest that Congress did not intend that the President's power under section 9 of the Selective Service Act to remove the numerous officers provided for therein should be hampered by such officers demanding a court-martial under section 1230, R. S. It is impossible to reconcile the powers of the President under section 9, Selective Service Act, *supra*, and section 1230, R. S. It must therefore follow that section 1230, R. S., is repealed by implication. Repeals by implication are not favored, and having regard to the policy of the law as it relates to the commissions of the officers in the Regular Army, it can, and should properly, be held that section 1230, R. S., is applicable only when an officer of the Regular Army is dismissed from his Regular Army commission. An officer of the Regular Army holding a temporary promotion or appointment and discharged therefrom reverts to his status as an officer in the Regular Army and he is not in any sense dismissed therefrom.

10. I am of the opinion that an officer of the Regular Army who has been given a temporary promotion in the Regular Army under section 8 of the Selective Draft Act of May 18, 1917 (40 Stat. 76).

can be discharged from this office by the President under section 9 of the same Act and that when so discharged he is not entitled to a court-martial under section 1230, R. S.

[Signed] S. T. Ansell, Acting Judge Advocate General.

30. TRANSFER FROM NATIONAL ARMY TO ENLISTED RESERVE CORPS

6th Ind.

War Department, J. A. G. O., April 23, 1918.—To the Adjutant General.

1. The Adjutant General refers to this office for remark the request of the Acting Quartermaster General for a decision as to the legality of the transfer of enlisted men of the National Army to the Enlisted Reserve Corps, inactive list, to enable them to accept employment in a war industry or to continue their studies in medical or military institutions, attention being directed to the provisions of the Act of June 3, 1916, creating the Enlisted Reserve Corps which provides for the organization thereof by actual enlistments and not by the transfer of enlisted men from another branch of the military service.

It appears that about 3,000 or more enlisted men have been transferred to the Enlisted Reserve Corps, inactive list, for the purpose of continuing medical, dental and veterinary studies or for the purpose of engaging in an industry necessary to the prosecution of the war.

2. The Enlisted Reserve Corps is a component part of the Army of the United States and under the Act of June 3, 1916, with the exceptions of the draft authorized under sections 79 and 111, Id. (Comp. St. 1916, §§ 3044q, 3045), all the component parts of the Army of the United States were maintained by volunteer enlistments for terms fixed therein.

The Selective Service Act, May 18, 1917 (40 Stat. 76), continues all enlistments in the Army of the United States then in force for the period of the emergency and authorizes the President to raise by selective draft the several forces therein mentioned. One of these forces is the so-called National Army. The term of service of its enlisted personnel is the period of the existing emergency and they are subject to the laws and regulations governing the Army of the United States in so far as such laws and regulations are applicable to persons whose permanent retention in the military service is not contemplated. Therefore, the question involves only the right of transferring an enlisted man from one component force to another.

3. In an opinion of this office dated September 17, 1917 (J. A. G. 6-200), in which the question of the transfer of officers and enlisted men from one component force of the Army of the United States to another was dealt with at length, it was held:

"In the light of what I have said, my response to the specific question must be that transfers of enlisted personnel from one force to another, in the sense of absolute incorporation in the force to which transferred, is permissible under the law; and, giving the reasoning the wider application it deserves, it seems to me to require the Department to abolish many of the distinctions which it conceives to exist between

and among such forces. I may be permitted to say here, with all deference, that I think the Secretary of War and the Chief of Staff might well review the department ruling recently made in respect of the appointment of staff officers in the National Army for duty other than with organizations of that army, a ruling accentuating distinctions, which in my judgment have no basis in law or fact. There is but one Army of the United States, and every organization, bureau, officer and man in the military service is a part of it."

4. While this opinion expressed some doubt as to the authority for transferring members of the Enlisted Reserve Corps to other forces composing the Army of the United States, it urged strong reasons for permitting such transfer but expressed no opinion on the converse of the proposition. Transferring enlisted men from the National Army to the Enlisted Reserve Corps will result in raising a part of that force by a different method from that authorized by the statute and doubtless would lead to perplexing complications. Furthermore, such transfers would not be simply from one force to another as contemplated in the opinion just quoted from, but would be from one force to an adjunct of another force which is peculiar to that force.

Section 55, National Defense Act, June 3, 1916, *inter alia*, provides: "There may be enlisted in the grade or grades hereinbefore specified, for a period of four years, under such rules as may be prescribed by the President, citizens of the United States, or persons who have declared their intentions to become citizens of the United States, subject to such physical, educational, and practical examination as may be prescribed in said rules. For men enlisting in said grade or grades certificates of enlistment in the Enlisted Reserve Corps shall be issued by the Adjutant General of the Army, but no such man shall be enlisted in said corps unless he shall be found physically, mentally, and morally qualified to hold such certificate and unless he shall be between the ages of eighteen and forty-five years. * * * And the Secretary of War is hereby authorized to issue to members of the Enlisted Reserve Corps and to persons who have participated in at least one encampment for the military instruction of citizens, conducted under the auspices of the War Department, distinctive rosettes or knots designed for wear with civilian clothing, and whenever a rosette or knot issued under the provisions of this section shall have been lost, destroyed, or rendered unfit for use without fault or neglect upon the part of the person to whom it is issued, the Secretary of War shall cause a new rosette or knot to be issued to such person without charge therefor. Any person who is not an enlisted man of the Enlisted Reserve Corps and shall not have participated in at least one encampment for the military instruction of citizens, conducted under the auspices of the War Department, and who shall wear such rosette or knot shall be guilty of misdemeanor punishable by a fine of not exceeding \$300, or imprisonment not exceeding six months, or both." Comp. St. 1916, § 1892e.

No educational or practical examination is required of a man drafted into the National Army and if he should be transferred to the Enlisted Reserve Corps, he would escape these requirements, and yet become a member of that corps. No provision is made by the statute for the issuance by the Adjutant General of the certificate of enlistment to

any but those enlisted in the Enlisted Reserve Corps nor is any person not an enlisted man of the Enlisted Reserve Corps unless he has participated in at least one encampment for the military instruction of citizens, permitted to wear the rosette or knot provided by the Secretary of War for these reserves. The period of service of members of the Enlisted Reserve Corps is four years while that of the members of the National Army is for the period of the war. It will thus appear that if men are transferred from the National Army to the Enlisted Reserve Corps, it will become composed of two groups or classes enlisted or serving under totally different requirements and for different periods.

To permit such transfers of men from active duty in the forces of the National Army to the Enlisted Reserve Corps, inactive list, appears to be violative of the spirit of the statute which seeks to secure immediate active military service, and does not at all contemplate reserve or inactive service by any men enlisted or drafted under its provisions. In fact, Congress has deemed it necessary to pass the Act of March 16, 1918 (Pub. 105—65th Congress), in order to authorize enlisted men to be released from active service to follow industrial pursuits. That Act provides for furloughing men with or without pay. If an emergency arises requiring more men in the Enlisted Reserve Corps than actually have enlisted therein, a sufficient number of men to meet this requirement could be discharged from the National Army upon the condition that they immediately re-enlist in the Enlisted Reserve Corps and thus obviate violating the provisions of the statute or giving an unwarranted construction thereto.

The object of section 55 of the National Defense Act is clearly and definitely set forth in the first part of that section as follows:

"For the purpose of securing an additional reserve of enlisted men for military service with the Engineer, Signal, and Quartermaster Corps and the Ordnance and Medical Departments of the Regular Army, an Enlisted Reserve Corps, to consist of such number of enlisted men of such grade or grades as may be designated by the President from time to time, is hereby authorized, such authorization to be effective on and after the first day of July, nineteen hundred and sixteen."

The rule of construction is that the law maker has a definite purpose in every enactment. This intention affords a key to the sense and scope of minor provisions. Obviously it was the purpose of this section to build up a reserve force of enlisted men, not by transferring those already in the service to this particular corps, but by obtaining new enlistments. Transferring already enlisted men from the National Army would secure no additional reserve of enlisted men and would fail to carry out the plainly expressed purpose of this section of the National Defense Act.

5. It is my opinion that enlisted men of the National Army cannot be transferred to the Enlisted Reserve Corps, inactive list, to enable them to accept employment in a war industry or to continue their studies in medical or military institutions.

[Signed] James J. Mayes, Acting Judge Advocate General.

31. FORFEITURE OF PAY AS AFFECTING ALLOTMENTS UNDER WAR RISK INSURANCE

(A)

(Decision of the Comptroller of the Treasury, April 23, 1918.)

My decision is requested of a question relative to the forfeiture of pay per sentences of courts-martial, presented by the Quartermaster General of the Army, as follows:

"Various cases in which soldiers have been absent without leave during the period over which a court-martial forfeiture is applied or where the unexecuted portion of sentence has been remitted have given rise to a serious difference of opinion and of practice with reference to the amount of forfeiture which could be collected. * * *

"Does a forfeiture of a fractional part of a soldier's pay per month accrue over a period of time during which the soldier is absent without leave or otherwise in a no-pay status?

"Example (1). Private A, serving in first enlistment period, last paid to Sept. 30, 1917, was sentenced Oct. 20, 1917, to forfeit two-thirds of his pay per month for three months; was absent without leave October 5 to 15, November 11 to 16, and December 24 to 29, 1917. In settlement of pay rolls for October, November and December should collection be made on each pay roll of two-thirds of a full month's pay, thereby effecting a collection of forfeiture of pay during the periods of absence, when no pay accrued; or should collection be made of two-thirds of the soldier's accrued pay during each of the months named, and on the pay roll for January, 1918, two-thirds of his pay for twenty days, thereby completing three full months' forfeiture?

"Example (2). Private M, serving in first enlistment period, last paid to Oct. 31, 1917, sentenced Nov. 15 to forfeit two-thirds of his pay for one month. Soldier absent without leave Nov. 1 to 10 and indebted to the United States \$5 for transportation. On what date does the court-martial forfeiture commence to run and what amount is properly collectible from November pay, attention being invited to so much of paragraph 1370½, Army Regulations, as provides that 'the forfeiture will not begin until such stoppages have been satisfied'?

"Example (3). Private N, serving in first enlistment period, last paid to Oct. 31, 1917, has in force compulsory allotment of one-half his pay, Liberty Loan allotment of \$5, and insurance premium of \$3.25. Sentenced Nov. 20, 1917, to forfeit two-thirds of his pay for one month. Does the forfeiture attack the entire month's pay; and, if not, what amount is attacked and what amount collectible on the November roll, attention being invited to the fact that the amount of the compulsory allotment is already withheld from the soldier by process of law?"

The views of the Judge Advocate General of the Army relative to this matter given the War Department March 22, 1918, are as follows:

"It is recommended that the Comptroller's decision be requested, but incidentally the views of this office will be indicated briefly. Paragraph 1370½, Army Regulations, declares that a sentence imposing forfeiture of a part of the pay for a month or number of months 'means

the forfeiture of the part of the pay, as specified, for each month.' This paragraph also prescribes the rule for determining the date when the forfeiture will begin to run. Paragraph 132, Army Regulations, provides that an enlisted man who absents himself from his post or company without authority will forfeit all pay and allowances thereafter accruing until the date of his return to military control.

"It is evident that a court-martial sentence forfeiting, say two-thirds of a soldier's pay for one month is not equivalent to the forfeiture of two-thirds of one month's pay. The forfeiture is not of a definitely ascertained amount of money, but is for a definite period of time and ceases at the expiration of that period, and, in the opinion of this office, it takes away from the soldier only the designated fractional part of the whole amount of pay to which he would otherwise have been entitled for the particular month. In example (1), therefore, where the forfeiture commenced on October 1st, it ceased at the end of December, and only two-thirds of the pay which the soldier earned during each of those months was forfeited.

"As to example (2), the forfeiture did not commence until the stoppage of \$5 standing against the soldier had been satisfied, as provided in Army Regulations 1370½, and the amount of this stoppage had to accrue after November 10th. At the rate of pay of \$30 per month the stoppage was satisfied on November 15th and the forfeiture commenced from and including the 16th. Therefore, for November the amount properly collectible was two-thirds of \$15, or \$10.

"As to example (3), the court-martial sentence does not operate upon that part of the soldier's pay which is compulsorily withheld as an allotment. As to the Liberty Loan allotment and the insurance premium, it is the view of this office that these should be regarded as Government obligations within the meaning of the provision of paragraph 1370, A. R., directing that 'when stoppages of the nature specified in sections 1 and 2 of paragraph 1370 stand against the soldier, the forfeitures will not begin until such stoppages have been satisfied.' Therefore, deducting one-half of the soldier's pay for November as his compulsory allotment leaves \$15 as his monthly rate to which the court-martial sentence may apply, and from this must be deducted the amounts due as Liberty Loan allotment and insurance premium, aggregating \$8.25, which will leave a balance of only \$6.75 to which the court-martial sentence will apply. Two-thirds of this sum is \$4.50. This will not be a literal satisfaction of the court-martial sentence, inasmuch as the sentence would not begin to run against the November pay until the 17th of November, but it is not apparent how the sentence could be given operation over into the succeeding month for the reason that the same class of deductions will intervene."

Paragraphs 1370 and 1370½, Army Regulations, are as follows:

"1370. Authorized stoppages will be entered on the payrolls and deducted at times of payment in the following order:

"1. Reimbursements to the United States.

"2. Reimbursements to individuals, as the quartermaster or post exchange, for instance.

"3. Forfeitures for desertion and fines. * * * Notwithstanding a sentence contemplates payment of a stated sum to a soldier upon his

release from confinement, it can not be made unless there is a sufficient balance to his credit after all authorized stoppages are deducted.

"1370 $\frac{1}{2}$. A sentence imposing forfeiture of a part of pay for a month or number of months means the forfeiture each month for the specified number of months of the specified part of that portion of pay which is not required to be allotted to dependent relatives of class A under the provisions of article II of the act approved October 6, 1917 [40 Stat. 402], commonly known as the war risk insurance act (C. A. R. No. 67, Jan. 31, 1918). If the sentence does not indicate any particular date when the forfeiture shall commence, it will begin with the date from which pay has accrued since last payment; except that when stoppages of the nature specified in sections 1 and 2 of paragraph 1370 stand against the soldier, the forfeiture will not begin until such stoppages have been satisfied. The rate of soldier's pay during the period over which the forfeiture is actually applied will govern the rate of the forfeiture."

The views of the Judge Advocate General upon the question presented are in harmony with the views of this office. From the laws and regulations now in force are formulated the following rules relating to the adjustment of accounts of soldiers where forfeitures of pay per sentences of courts-martial of the description given arise:

1. A forfeiture of a fractional part of a soldier's pay per month does not apply to a period of time during which the soldier was absent without leave or otherwise in a no-pay status.

2. The period of a soldier's absence without leave is from the date of his leaving without authority to the date of his return to military control; the day of leaving being a day of absence and the day of return a day of duty, without regard to hours. 14 Comp. Dec. 29.

3. No pay accrues in the period of absence without leave; and where no pay accrues there is no pay to forfeit.

4. Where, as in the cases cited, the sentence does not indicate any particular date when the forfeiture shall begin, it will begin with the date from which pay has accrued since last payment.

5. The rate of soldier's pay during the period over which the forfeiture is actually applied will govern the rate of the forfeiture.

6. Forfeiture of a part of the pay for one month or a number of months signifies the forfeiture of the part of the pay, as specified, for each month. Forfeiture of "two-thirds of his pay for one month" is not equivalent to forfeiture of two-thirds of one month's pay. The forfeiture in such case is for a definite period of time, one month, and ceases at the expiration of that period even if the soldier was in a pay status only a part of that period.

7. The monthly compulsory allotments of pay class A under the provisions of sections 200 to 210 of the act of October 6, 1917 (40 Stat. 402 to 405), the allotments under class B, of said law (NOTE.—The J. A. G. has requested the Comptroller to reconsider this statement with reference to class B allotments), the Liberty Loan allotments, and the premiums on war-risk insurance are not disturbed or affected by such sentences of courts-martial imposing a forfeiture of pay.

In each of the three cases cited the soldier was serving as a private in his first enlistment period. Assuming that the rate of the month-

ly pay of each under the provisions of section 10 of the Act of May 18, 1917 (40 Stat. 82), was \$30, the accounts, in order to make clear this decision, are here stated as follows:

Example (1). Private A, last paid to September 30, 1917, was a. w. o. l. 20 days as follows: October 5 to 14, inclusive, 10 days; November 11 to 15, inclusive, 5 days; and December 24 to 28, inclusive, 5 days.

Pay from Oct. 1 to Dec. 31, 1917, less 20 days a. w. o. l., $2^{10}/_{30}$ months at \$30	\$70.00
Forfeited per sentence C. M. $\frac{2}{3}$ of \$70.....	46.67
Balance payable to soldier.....	\$23.33

Example (2). Private M, last paid to Oct. 31, 1917, was a. w. o. l. Nov. 1 to 10, inclusive, 10 days.

Pay from Nov. 1 to 30, 1917, less 10 days a. w. o. l. $2^{10}/_{30}$ months at \$30..	\$20.00
Deduct amount due U. S. for transportation.....	5.00
	\$15.00
Forfeited per sentence C. M. $\frac{2}{3}$ of \$15.....	10.00
Balance payable to soldier.....	\$ 5.00

Example (3). Private N, last paid to Oct. 31, 1917. No absence without leave.

Pay from Nov. 1 to 30, 1917.....	\$30.00
Deduct:	
Liberty Loan allotment.....	\$ 5.00
Premium on war-risk insurance.....	3.25
Compulsory allotment for dependent relative, $\frac{1}{2}$ of \$30.....	15.00
	23.25
	\$ 6.75
Forfeiture per sentence C. M. $\frac{2}{3}$ of \$6.75.....	4.50
Balance payable to soldier.....	\$ 2.25

(B)

(Decision of the Comptroller of the Treasury, May 18, 1918.)

The Honorable the Secretary of War.

Sir: I have from the Adjutant General of the Army a letter, presumably by your direction, dated May 6, 1918, as follows:

"There is transmitted herewith a communication from the Judge Advocate General of the Army, dated May 1, 1918 (243.61 A. G. O.), relative to the effect of court-martial sentences upon soldiers' allotments, etc. Consideration of paragraphs 2 and 3 in particular is requested."

The inclosed communication from the Judge Advocate General is worded in part as follows:

"1. Attention is invited to the accompanying copy of the Comptroller's decision of April 23, 1918, upon certain questions submitted by the Quartermaster General with reference to court-martial fines, and especially to paragraph 7, page 5, reading as follows:

"The monthly compulsory allotments of pay class A under the provisions of sections 200 to 210 of the Act of October 6, 1917 (40 Stat.

402 to 405), the allotments under class B of said law, the Liberty Loan allotments, and the premiums on war-risk insurance are not disturbed or affected by such sentences of courts-martial imposing a forfeiture of pay.' * * *

"2. As this office views it, that part of the Comptroller's decision under discussion is not in accordance with the provisions of Army Regulations, nor does it seem to be in keeping with sound administrative policy. It is, therefore, recommended that the Comptroller be requested to give further consideration to this phase of his decision with a view to its modification.

"3. It is also recommended that inquiry be made of the Comptroller as to whether it will meet with his approval for the War Department to publish his decision as effective from the date upon which it shall be received at the various Army stations and posts, in order that there may be no confusion with respect to past transactions."

By the terms of section 7 of the Act of March 3, 1851 (section 4818. Revised Statutes [Comp. St. 1916, § 9220]), "all stoppages or fines adjudged against soldiers by sentence of courts-martial, over and above any amount that may be due for the reimbursement of Government or of individuals" are set apart and appropriated as a fund for the support of the Soldiers' Home; and under the provisions of section 8 of the Act of March 3, 1883 (22 Stat. 565 [Comp. St. 1916, § 9222]), said fund shall be deposited in the Treasury of the United States to the credit of the Soldiers' Home, "as a permanent fund."

Paragraph 1363, Army Regulations, 1863, is as follows:

"1363. Authorized stoppages to reimburse the United States, as for loss or damage to arms, equipments, or other public property; for extra issues of clothing; for the expense of apprehending deserters. or to reimburse individuals (as the paymaster, laundress, etc.); forfeitures for desertion, and fines by sentence of court-martial, will be entered on the roll and paid in the order stated."

This is one of the regulations recognized and continued in force by section 37 of the Act of July 28, 1866 (14 Stat. 338).

The persons included in the term "individuals" as used in the act of 1851 and section 4818 are not described in any law, but in the settlement of claims of soldiers for pay and allowances the term has been held to include disbursing officers of the Army, laundresses, laundrymen, sutlers under the old laws, company tailors, post exchange, etc., and the persons for whom reparation is provided in the 89th and 105th Articles of War established by Act of August 29, 1916 (39 Stat. 664, 667 [Comp. St. 1916, § 2308a]). The stoppages in favor of individuals follow those in favor of the Government and precede the forfeitures of pay imposed by sentence of courts-martial.

An Army Regulation can not have the effect of depriving the accounting officers of the Treasury of the jurisdiction conferred upon them by the statutes, namely; the right and duty of examining, and passing upon the legality of expenditures. The Judge Advocate General uses the term "court-martial fines." All the questions submitted relate to forfeitures, per sentences of courts-martial, of a fractional part of a soldier's pay per month for a period of one, two, or three months. The phrase "a sentence imposing forfeiture of a part of pay

for a month or number of months," as used in paragraph 1370½ of the Army Regulations, must not be confused with a sentence imposing a fine of a specific sum of money.

In paragraph 1370½ the Secretary of War has very clearly and correctly stated that—

"A sentence imposing forfeiture of a part of pay for a month or number of months means the forfeiture each month for the specified number of months of the specified part of that portion of pay which is not required to be allotted to dependent relatives of class A under the provisions of article II of the act approved October 6, 1917, commonly known as the war risk insurance act."

I know of no provision of law, or regulation in entire harmony with the most recent legislation, under which a sentence imposing a forfeiture such as above described can operate against the monthly allotments of pay under classes A and B, sections 200 to 210 of the Act of October 6, 1917 (40 Stat. 402 to 405), or against the Liberty Loan allotments and the premiums on war risk insurance, and after a careful consideration of all the laws enacted since April 6, 1917, the decision of April 23, 1918 (24 Comp. Dec. 621), to the effect that such items are not disturbed or affected by the courts-martial sentences described in said decision will take effect June 1, 1918.

32. FORFEITURE OF PAY BY DESERTER

Pay and Allowances III C 1, 2—Desertion XIV.

4th Ind.

War Department, J. A. G. O., April 25, 1918.—To the Adjutant General.

1. The Adjutant General refers to the provisions of Army Regulations relating to the pay of soldiers charged with desertion, and desires to be advised "when a deserter starts to receive his pay and allowance—i. e., whether from the date of his return to military control, or from the date of his return to a duty status."

2. In paragraph 129, A. R., it is declared with reference to persons charged with desertion that "while awaiting trial they will receive no pay." In paragraph 130, it is provided that a soldier in desertion or absent without leave who surrenders or is apprehended before his term of enlistment has expired "is entitled to pay and allowances from the date of his return to military control." Paragraph 131 contains provisions with reference to the restoration of a deserter to duty without trial, subject to the condition that "he must forfeit pay while absent." Paragraph 1372 contains the following provision:

"An enlisted man charged with desertion will not receive pay until his offense has been investigated by a court-martial, or he has been restored to duty without trial or the charge has been set aside as having been erroneously made."

There is nothing inconsistent in these several provisions of the Army Regulations. The principle is well established that a deserter forfeits, not only all pay and allowances during his absence, but also all

that had accrued at the time of his desertion. *United States v. Landers*, 92 U. S. 77, 23 L. Ed. 603. While absent without leave, a soldier forfeits his right to pay and allowances. But in neither case does the forfeiture extend beyond the date the soldier is returned to military control. His pay and allowances from that time begin to accrue, and he is entitled to be paid compensation for the future unless it be forfeited by court-martial or deducted under A. R. 127. The declaration in A. R. 129, that the soldier will receive no pay while awaiting trial for desertion does not mean that no pay accrues to him, but simply that he will not receive it while he is awaiting trial, the reason being that it is subject to forfeiture by court-martial, or may be deducted in payment of the expenses of his apprehension and delivery if he is found guilty of desertion (A. R. 127). In the paragraph next following (A. R. 130) it is specifically provided that the soldier is entitled to pay and allowances from the date of his return to military control; that is, his pay and allowances begin to accrue from that date and may, after his case is disposed of, be paid to him unless they be forfeited by a court-martial sentence, or required to pay the expenses of the soldier's apprehension, etc. See Manual for the Quartermaster Corps, paragraphs 1331 to 1337.

[Signed] James J. Mayes, Acting Judge Advocate General.

33. ELIGIBILITY BY INDUCTED MEN FOR WAR RISK INSURANCE BENEFITS

(A)

May 1, 1918.

From: The Office of the Judge Advocate General.

To: The Bureau of War Risk Insurance, Legal Section.

Subject: Status of certain inducted men.

1. In a communication dated April 26, 1918, from the Legal Section, Bureau of War Risk Insurance, to the Judge Advocate General, inquiry is made as to the status of so-called inducted men. It is stated that these men have been voluntarily inducted into the military service prior to the time when they would be regularly called in the draft; that they are paid from the time they receive their travel allowance from their local boards; that they are transported to camp, held in quarantine for two weeks, during which time they are inoculated, and given complete outfits of clothes, but are not sworn in; that at the end of two weeks many of them are discharged for physical defects; and that during said two weeks many of them make application for War Risk Insurance. The opinion of this office is desired as to the validity of applications for insurance of such of these inducted men as are discharged at the end of two weeks.

2. This office is informed by the office of the Provost Marshal General that men who have been inducted into the military service, pursuant to the Selective Service Regulations, prior to the time that their draft number is called, are treated in all respects by their local boards as other drafted men. They are first examined by the local boards, and after having passed satisfactory physical examination are classi-

fied by their local boards for unlimited military service, and are then permitted to be inducted into special branches of the service before their numbers in the draft are called. They are regarded as in the service from the date upon which their orders require them to entrain or report for military service. Consequently, these men are in active service within the meaning of the War Risk Insurance Act of October 6, 1917 (40 Stat. 398), from the date when they obey the order to report for military service. Insurance applications made by them during the two weeks when they are in quarantine are valid and entitle them to insurance under article IV of said act. The fact that no oath has been taken by them is entirely immaterial. The law does not require or contemplate that any oath be taken by men drafted into the service or by men inducted into the service in the manner above described.

[Signed] James J. Mayes, Acting Judge Advocate General.

(B)

6th Ind.

War Department, J. A. G. O., July 5, 1918.—To the Adjutant General.

1. There are referred to this office for opinion the following papers: Telegram from Major General Greene to the Adjutant General of the Army; telegram from the insurance officer at Camp Lewis, Washington, to the Director of the Bureau of War Risk Insurance; telegram from Commissioner Nesbit of the Bureau of War Risk Insurance to the insurance officer at Camp Lewis, Washington; and various indorsements transmitting these papers through military channels. In the papers in reference two questions are raised: (1) At what date do compulsory allotments of draft delinquents begin to run? (2) At what date does the 120 day period within which a member of the military forces must make his application for War Risk Insurance begin to run? Commissioner Nesbit advised that the compulsory allotment begins on the same date when pay begins to accrue, which is taken to be the day when the man actually reports for duty. Major General Greene recommends that the same date be taken as the date upon which the 120 day period above referred to begins to run.

2. When a man drafted into the military service of the United States fails to respond to the order directing him to report, he is either absent without leave or in desertion. Consequently, no pay accrues to his credit, and there is no pay from which a compulsory allotment can be made. Therefore this office is of the opinion that Commissioner Nesbit's ruling is substantially correct. By the terms of the 2d Article of War, the Selective Draft Act and the Selective Service Regulations a man is in the military service from the date which is specified as the date on which he is required to report in the order directing him to report for service. The 120 day period begins to run from that date. By neglect or refusal to report he cannot extend the time for making such application.

[Signed] James J. Mayes, Acting Judge Advocate General.

34. DISCHARGE FOR DISLOYALTY PRIOR TO ACTIVE SERVICE

Office IV E 2—Discipline VIII G.

2d Ind.

War Department, J. A. G. O., May 2, 1918—To the Adjutant General.

1. These papers relate to First Lieutenant ———, Medical Reserve Corps, and present the question whether or not he may be brought to trial by court-martial for his alleged disloyal utterances before being ordered into active service. The preceding indorsement indicates that this officer was ordered to active duty April 24, 1918. The other papers in reference show that the alleged disloyal sentiments expressed by him were so expressed, if at all, prior to the time he was ordered into active service. Section 38 of the National Defense Act of June 3, 1916 (39 Stat. 166, 191 [Comp. St. 1916, § 1881b]), provides that—

“Any officer who, while holding a commission in the Officers’ Reserve Corps, shall be ordered to active service by the Secretary of War shall, from the time he shall be required by the terms of his order to obey same, be subject to the laws and regulations for the government of the Army of the United States, insofar as they are applicable to officers whose permanent retention in the military service is not contemplated.”

The 2d Article of War (Comp. St. 1916, § 2308a) provides that—

“The following persons are subject to these Articles and shall be understood as included in the term ‘any person subject to military law’ or ‘persons subject to military law,’ whenever used in these Articles; provided, that nothing contained in this Act, except such as specifically provided in Article II, subparagraph (c), shall be construed to apply to any person under the United States Naval jurisdiction unless otherwise specifically provided by law.

“(a) All officers and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted or ordered into, or to duty for training in, the said service, from the dates they are required by the terms of the call, draft or order to obey the same.”

It is the opinion of this office that Lieutenant ———, referred to in the accompanying papers, did not become subject to military law until ordered to active service, and may not be tried by court-martial for the acts committed, or disloyal utterances made, by him prior to that time.

2. It may be proper to remark that the papers in reference disclose some misunderstanding or confusion concerning this officer. In a communication under date of March 27, 1918, addressed to this office by the Chief, Military Intelligence Branch, Executive Division, it was stated that this officer was then on duty at Kelly Field, San Antonio, Texas, and in that communication there was a digest of two reports concerning him made to the Military Intelligence Branch under dates of February 21 and February 28, 1918. The communication and the digest of reports referred to indicated that the of-

ficer had been guilty of conduct which might properly be made the basis of charges triable by court-martial, and further disclosed that the witnesses whose testimony must necessarily be used to support the charges lived in and around New York City. In this situation, this office, under date of April 4, 1918, recommended that the officer be sent to the Eastern Department for trial, and the report of the Military Intelligence Branch be referred to the Commanding General of the Eastern Department, with a view to the immediate formulation of charges against him. Obviously, if this officer was not ordered to active duty until April 24, 1918, the statement that he was on duty at Kelly Field on March 27, 1918, was an error and must have resulted from confusing him with some other officer.

3. If upon investigation it shall be found that the officer ordered to active duty on April 24, 1918, is the person referred to in the communication from the Military Intelligence Branch under date of March 27, 1918, and that prior to being ordered to active duty he was guilty of acts of disloyalty, or the expression of disloyal sentiments, such as enumerated in the communication of March 27, manifestly, he should not be retained in the service. It appears that he was appointed an officer in the Medical Reserve Corps on March 29, 1917, that he accepted the appointment on April 6 and took the oath as an officer April 7, 1917. The appointment was made under authority of section 37 of the National Defense Act (Comp. St. 1916, § 1881a), and the concluding paragraph of that section reads in part as follows:

"The commission of all officers of the Officers' Reserve Corps shall be in force for a period of five years, unless sooner terminated in the discretion of the President."

The plain meaning of this language is that the President, at his discretion, may at any time and for any cause deemed sufficient by him, terminate the commission of an officer of the Reserve Corps. The power thus conferred upon the President has not been restricted by any subsequent legislation.

Paragraphs 41 and 42, of Special Regulations No. 43, pertaining to the Officers' Reserve Corps as amended by Changes No. 4 of said Special Regulations No. 43, W. D., January 17, 1918, authorize the convening of a board to examine into and report upon whether or not a member of the Officers' Reserve Corps is unfitted for his duties by reason of habits, lack of character, or inefficiency. The power conferred upon the President to terminate the commission of a member of the Officers' Reserve Corps is statutory and is not restricted or impaired by these regulations. The latter simply provide a machinery for the investigation into the character, conduct, qualifications, and efficiency of a reserve officer, as a matter of administrative convenience, and for the information of those who may be called upon to report upon these matters, or for the information of the President who may be called, in the exercise of his discretion, to terminate the commission of a reserve officer. The discretionary power of the President to terminate the commission of a reserve officer, under section 37 of the National Defense Act, taken in connection with the regulations which provide for the convening of a board to examine into and report upon the fitness of a reserve offi-

cer to remain in the service, provide methods for the elimination of reserve officers, quite analogous to that provided by section 9 of the Selective Service Act for the elimination of officers appointed pursuant to the several sections and paragraphs of that act enumerated in said section 9. As in section 9, the President is given authority to discharge any officer for any cause, which in his judgment, would promote the public service, and additionally, provision is made for the convening of a board of officers to examine into and report upon the character, conduct and qualifications of officers therein referred to, so section 37 of the National Defense Act and the regulations pertaining to reserve officers which have been referred to, provide for like machinery for the elimination or the discharge of reserve officers.

4. In the present case, it is the opinion of this office that it would not be advisable to convene a board under the provisions of Paragraphs 41 and 42, and changes No. 4, Special Regulations No. 43; that the President at his discretion, notwithstanding such regulations, may terminate the commission of the officer in question for any cause, which, in his judgment, is sufficient, and that the commission of this officer should be terminated by executive action, under the authority of section 37 of the National Defense Act, should investigation prove that he has been guilty of the conduct charged against a reserve officer of like name in the communication of March 27, 1917, from the Chief, Military Intelligence Branch, Executive Division.

[Signed] James J. Mayes, Acting Judge Advocate General.

35. RE-ENLISTMENT STATUS

2d Ind.

War Department, J. A. G. O., May 7, 1918.—To the Adjutant General.

1. The Adjutant General submits to this office for remark a letter dated April 24, 1918, from Lieut. M. C. Custin, F. S. Ret., requesting information as to the status of an enlisted man of the Army of the United States, who has been heretofore discharged to accept a commission and who tenders himself for re-enlistment within three months after the termination of his commissioned service, but before the passage of the Act of Congress, approved March 30, 1918. (Pub. 105, 65th Cong.)

From the papers in reference it appears that David McCartney on November 26, 1917, was discharged to accept a commission; that he resigned February 28, 1918, and re-enlisted as a private March 18, 1918. It does not clearly appear from the papers what grade was held by him before being discharged, but it is assumed that he was a sergeant G. S. I., and was discharged to accept a commission in some component part of the Army of the United States.

2. The Act of Congress, approved March 30, 1918 (Pub. 115, 65th Cong.), provides:

"That any enlisted man of the Army of the United States, who has heretofore been, or shall hereafter be, discharged to accept a commission in any component part of the Army of the United States,

and who shall tender himself for enlistment within three months after the termination of his commissioned service, shall, subject to such examination for enlistment as is provided by law or regulation, be accepted and be restored to the grade held by him before being discharged to accept such commission; and in computing service for retirement and continuous-service pay he shall be credited with all time served with the forces of the United States, and his service shall be deemed continuous, notwithstanding the interruption thereof by the changes of status provided for herein."

It will be observed that the re-enlistment of McCartney, while being within three months after the termination of his commissioned service, occurred twelve days before the passage of the Act of Congress quoted above. At the time he re-enlisted, no law existed which permitted him to be restored to the grade he formerly held; and unless this statute is retroactive, he cannot be affected thereby.

"The general rule is that statutes will be construed to operate prospectively only, unless an intent to the contrary clearly appears. It is said 'that a law will not be given a retroactive operation unless that intention has been manifested by the most clear and unequivocal expression.' And in another case: 'The rule is that statutes are prospective and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction.' * * * It is always presumed that statutes were intended to operate prospectively and all doubts are resolved in favor of such construction." Lewis' *Suth. Stat. Const.* § 642 (Ed. 1904).

3. The evident purpose of the statute is to encourage the speedy re-enlistment of a certain class of discharged men, and the language employed indicates that it was intended to apply only to future re-enlistments. No logical reason appears for expanding such a statute, by giving it retroactive force so as to include past re-enlistments. Such construction would not only be violative of the intent and purpose of the law, but is unwarranted by the language used. The words, "shall tender himself for re-enlistment" clearly do not refer to any past action. "The word *shall* in its common and ordinary usage, unless accompanied by qualifying words which show a contrary intent, always refers to the future." *Jones v. Bank*, 17 Colo. App. 79, 67 Pac. 177. No such qualifying words are used. McCartney re-enlisted as a private before this statute was passed; his status as to grade was fixed by the law in force at the time of such re-enlistment, and is not affected by this statute.

4. I am of the opinion that the Act of Congress, March 30, 1918 (Pub. 105, 65th Cong.), is not retroactive, and that David McCartney is not entitled, under his re-enlistment of March 18, 1918, to be restored to the grade held by him prior to his discharge to accept a commission.

[Signed] James J. Mayes, Acting Judge Advocate General.

36. EXTRA COMPENSATION FOR EXTRA WORK

An Army Field Clerk is an officer whose pay is fixed by law. He cannot be paid additional compensation for performing duties of another position unless the compensation thereof is fixed by law or regulation prior to the employment. There is no law or regulation fixing the compensation of a reporter for a Board of Officers convened to investigate the capacity and qualifications of other officers for retention in the service. Consequently an Army Field Clerk can be paid no compensation for performing the duties of such reporter. Ops. J. A. G. 231.3, May 7, 1918.

4th Ind.

War Department, J. A. G. O., May 7, 1918.—To the Adjutant General.

1. The opinion of this office is requested whether the accompanying accounts in favor of Army Field Clerk James C. Nelson, Camp MacArthur, Waco, Texas, for services as a reporter for a Board of Officers convened to investigate the capacity, qualification, and fitness of certain officers may be legally paid.

2. There are three accounts rendered in blank by Mr. Nelson for services as reporter in April, 1918, in connection with the investigation of three officers by a Board convened at Camp MacArthur, under the provisions of section 7, G. O. 76, W. D., 1917. As explanation for utilizing the services of Army Field Clerk Nelson, the following certificate is submitted by the Acting Adjutant at Camp MacArthur, dated April 8, 1918:

"I certify that the services of Field Clerk James C. Nelson, U. S. Army, could be spared from these Headquarters on April 3, 1918, for the purpose of acting as reporter before the Board of Officers convened pursuant to S. O. 74, April 2, 1918, these Headquarters.

"I also certify that the transcribing of his shorthand notes did not in any way interfere with his work in this office, as same was done at night after hours."

The president of the Board for which the services were rendered made the following certificate:

"I certify that the services of a reporter were absolutely necessary before the Board of Officers convened pursuant to S. O. 74, Headquarters Camp MacArthur, Texas, April 2, 1918, and that the services of a civilian reporter could not be had."

The accounts are submitted to the Department for information as to what rate of compensation is payable for the services, and in this connection, the Quartermaster General refers to the opinion of this office of January 17, 1918, in which it was held that an Army Field Clerk may be employed in the capacity of a reporter for a court-martial and receive compensation for such employment, provided it does not interfere with his regular duties. Reference may also be made to Digest Opinions, J. A. G., 1912-17, page 648, in which there is reported a ruling to the same effect.

3. Whether in any particular case an officer or employee of the Government may be employed in an additional place or position and

receive compensation therefor in addition to the compensation of his regular position, depends upon the provisions of certain statutes, known as the "double compensation statutes." In the present case it is necessary to consider only section 1765, Revised Statutes (Comp. St. 1916, § 3234), which provides:

"No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

An Army Field Clerk is an officer whose pay is fixed by law. He, therefore, comes within the prohibition of this statute and cannot be paid additional compensation for performing duties of any other position unless the compensation of the second position is authorized by law. This means that the matter of compensation of the second position must have been fixed by law, or by regulations in pursuance of law, prior to the employment. The rule was thus stated by the Comptroller of the Treasury in 10 Comp. Dec. 726:

"Where a person, who holds a federal position with a fixed salary or compensation, is appointed to another independent place or position, the holding of which is not incompatible with the holding of said prior place, he is not entitled to compensation for such second position, unless the salary or compensation thereof was fixed by law or regulation prior to his appointment thereto." See also 20 Comp. Dec. 223.

This statute (R. S. § 1765) has been construed and applied in many cases by the accounting officers and by the Attorney General and by the Supreme Court of the United States, and the rule laid down by the Comptroller, quoted above, represents the substance of the decisions. See Comp. Mil. Laws, pars. 169, 170 and footnotes.

Applying this rule in the present case, it is clear that Army Field Clerk Nelson cannot legally be paid for the services he rendered as reporter for a Board of Officers convened to investigate the qualifications of other officers for retention in the service, for the reason that there is no law or regulations for such a position with a fixed rate of compensation. The authority contained in the law regulating compensation for reporters for courts-martial (Manual for Courts-Martial, par. 113 et seq.) is not applicable. For the reasons stated, it is the view of this office that Mr. Nelson cannot be paid additional compensation for said service.

3 Incls.

[Signed] James J. Mayes, Acting Judge Advocate General.

37. DISCHARGE WITHOUT TRIAL OR BOARD

Office IV E.

2d Ind.

War Department, J. A. G. O., May 10, 1918.—To the Adjutant General.

1. In the preceding indorsement you ask for an opinion upon—
“(a) Whether or not Dr. Frederick A. King is entitled to trial by court-martial under section 1230, Revised Statutes [Comp. St. 1916, § 2003].”

“(b) What officers of the Army, if any, are entitled to trial under section 1230, Revised Statutes, subsequent to summary discharge or dismissal by the President, or discharge pursuant to approved findings of boards of officers convened in accordance with the provisions of section 9 of the Act of May 18, 1917 [40 Stat. 82].”

2. Paragraph (a) of your inquiry will be first considered. The papers in reference show that prior to August 5, 1917, Dr. Frederick A. King was a member of the medical corps of the Massachusetts National Guard, holding the grade of major, and upon that day was drafted into the service of the United States under the Act of May 18, 1917, and appointed to the grade held by him in the National Guard. Thus he was drafted into the Federal service and appointed to the grade of major pursuant to the second paragraph of section 1 of the Act referred to, which authorized the President “to draft into the military service of the United States, organize and officer, in accordance with the provisions of section one hundred eleven of said National Defense Act, so far as the provisions of said section may be applicable and not inconsistent with the terms of this Act, any and all members of the National Guard and of the National Guard Reserves, and said members so drafted into the military service of the United States shall serve therein for the period of the existing emergency unless sooner discharged.”

Section 9 of said Act provides in substance, that the appointments authorized and made, as provided by the second and other enumerated paragraphs of section 1, and by section 8 of the Act, and temporary appointments in the Regular Army authorized by the first paragraph of section 1, shall be for the period of the emergency unless sooner terminated by discharge or otherwise, and “the President is hereby authorized to discharge any officer from the office held by him under such appointment for any cause which, in the judgment of the President, would promote the public service.”

This section makes further provision for appointment by the Commanding General of any division or higher tactical organization, or of a territorial department, of a board to examine into and report upon the capacity, qualifications, conduct and efficiency of any officer within his command, other than officers of the Regular Army holding permanent or provisional commissions, and if the report of such board be adverse to the continuance of such officer in the service, and be approved by the President, such officer shall be discharged. The

provisions which authorize the appointment of efficiency boards, so called, do not impair or restrict the power of the President to discharge any officer within the enumerated classes for any cause which, in the judgment of the President, would promote the public service. They are convened as a matter of administrative convenience for the purpose of examining into and reporting upon the qualifications which go to the fitness of an officer to remain in the service, for the information of the President when called upon to exercise the executive power to discharge an officer, but it is not necessary that a board be convened and report made upon the fitness of an officer as a precedent condition to the exercise of the executive power to discharge.

It is assumed that Dr. Frederick A. King was discharged by authority of the President under the above-quoted provisions of section 9, and, if so, the discharge was authorized and Dr. King is not entitled to trial by general court-martial under section 1230, Revised Statutes.

3. That part of your inquiry embraced in paragraph (b) thereof involves several questions which will be stated and answered separately.

First: Any officer brought into the service or appointed under authority of the second, third, fourth, fifth, sixth and seventh paragraphs of section 1 of the Act of May 18, 1917, or holding office by temporary promotion or appointment under section 8 of that Act, or by temporary appointment in the Regular Army authorized by the first paragraph of section 1 of that Act may, under section 9 of the same Act, be discharged (a) by the President for any cause which, in his judgment, would promote the public service, and (b) any such officer, (not an officer of the Regular Army holding a permanent or provisional commission therein) may be discharged upon approval by the President of the report of an Efficiency Board, appointed under the provisions of section 9 and General Order 76, War Dept., 1917, adverse to the continuance of such officer in the military service.

Second: The commission of any Reserve Officer may be terminated (a) at any time by the President, under the following provision of section 37 of the National Defense Act (Comp. St. 1916, § 1881a):

"The commissions of all officers of the Reserve Corps shall be in force for a period of five years unless sooner terminated in the discretion of the President"

—or (b) upon the approval of the findings of a Board appointed pursuant to paragraphs 41 and 42 and change 4, special regulations No. 43, relating to the Officers' Reserve Corps, that because of habits, lack of character, or inefficiency, he evidences unfitness for the office which he holds.

Third: Provisional appointments made by authority of section 23 of the National Defense Act (Comp. St. 1916, § 1920b) may be terminated at any time under authority of the concluding clause of the first paragraph of section 1 of the Act of May 18, 1917, whenever it is determined in the manner prescribed by the President that the officer has not the suitability and fitness for permanent appoint-

ment. Paragraph 7 of General Order No. 76, W. D., June 26, 1917, prescribes the manner in which it may be determined that provisional (and temporary) officers have not the suitability and fitness requisite for permanent appointment.

An officer belonging to any of the above enumerated classes, discharged in accordance with the provisions of law and the regulations to which reference has been made, is not entitled to trial by court-martial upon his demand under section 1230, Revised Statutes.

4. The remaining question to be considered is what officers of the Army are entitled upon demand to trial by court-martial under the provisions of section 1230, R. S., when summarily dismissed from the service. The several regulations and statutory provisions which have just been discussed relate to discharge and not to dismissal. In military usage the words "dismissal" and "discharge" convey entirely separate and distinct meanings. A person may be honorably discharged but cannot be honorably dismissed, for the word "dismissal" implies a dishonorable separation from the service. On September 8, 1917, this office transmitted a memorandum to the Acting Chief of Staff, in response to an inquiry submitted in regard to the construction of section 9 of the Act of May 18, 1917, in its relation to section 1230, R. S., and the following quotation therefrom seems fully to answer that part of your inquiry relating to the right of officers, summarily dismissed by the President, to demand a trial by court-martial under said section 1230:

"It is my opinion that section 1230, Revised Statutes, was not repealed or superseded by the Act of May 18, 1917. The application of that section is, however, limited by its terms to a particular class of cases. Only such officers as are 'dismissed' from the service on 'charges' which can properly be made the subject of trial by court-martial are given the right to demand trial by court-martial in the event they believe themselves to have been 'wrongfully' dismissed. This does not mean that the President may not discharge an officer, under the authority contained in the Act of May 18, 1917, against whom charges are pending on which it might be proper to bring him to trial by court-martial. If, in such case, the President should discharge the officer, it could only mean that he had adopted the expedient of granting an honorable discharge in order to terminate the services of the officer in question, rather than to dismiss him because of the charge against him. Should, however, the President dismiss the officer on such charges rather than discharge him, as he would have a right to do, such officer would, under the provisions of section 1230, Revised Statutes, have a right to apply for trial by court-martial if he should deem himself wrongfully dismissed.

"It is, therefore, the opinion of this office that the only provision of prior law which must be considered in connection with that part of section 9 of the Act of May 18, 1917, which relates to the authority of the President to discharge certain officers from the offices held by them, in section 1230, Revised Statutes. That section does not, however, serve in any way to limit the authority of the President to 'discharge' officers, but does apply to his action whenever he

'dismisses' an officer because of charges which might be made the subject of trial by court-martial."

[Signed] James J. Mayes, Acting Judge Advocate General.

38. ELIGIBILITY OF ALIEN AS OFFICER

Office III A 1.

An alien, who believed himself to be a citizen, was commissioned in the Officers' Reserve Corps. Held, that since the National Defense Act required members of the Officers' Reserve Corps to be citizens and since the War Department has no power to waive the requirements of an Act of Congress, it is impossible for the alien to retain his commission. Ops. J. A. G. 210.1, May 11, 1918.

6th Ind.

War Department, J. A. G. O., May 11, 1918.—To the Adjutant General.

1. The question asked is whether Second Lieutenant George F. Macdonald, Infantry Reserve Corps, can legally retain his present commission. When he was commissioned he believed himself a citizen of the United States. But he was then, and still is, an alien.

2. The seventh section of the National Defense Act (39 Stat. 166) expressly requires members of the Officers' Reserve Corps to be citizens. It is beyond the power of the War Department to waive the requirements of an Act of Congress, and hence it is impossible for Lieutenant Macdonald to retain his present commission.

3. The first section of the Selective Draft Act (40 Stat. 76) distinctly states that for the National Army, officers may be selected "from the country at large"; and as there is no requirement of citizenship it follows that, so far as the statutes of the United States are concerned, Lieutenant Macdonald can be commissioned in the National Army. The practice of the War Department to commission only citizens is a practice that can be waived. If the practice be waived in this instance, it is advisable that the commission in the National Army should take effect as of the day when Lieutenant Macdonald was called into the service.

[Signed] James J. Mayes, Acting Judge Advocate General.

39. EFFECT OF STAFF COMMISSION ON LINE COMMISSION

Office IV A.

May 11, 1918.

Memorandum for the Adjutant General.

1. With your memorandum of March 21, 1917, you attach a list of officers who have been appointed in the Judge Advocate General's department in the grade of Major and who have entered upon their duties as such but have not resigned their line commissions. You request an opinion whether, under the law, the acceptance by these officers of

commissions in the Judge Advocate General's department vacated their line commissions. In the case of Major Howze, permanent Major, Field Artillery, you state that he has not formally accepted his commission in the Judge Advocate General's department but has constructively accepted it by entering upon his office as Judge Advocate.

2. The right to hold two commissions in the military establishment must be found in express legislation or the acceptance of a second commission either formally or constructively, by entering upon the duties of the second commission, vacates the first commission.

3. Title 14, R. S., entitled "The Army," chapter 1, "Organization," is a comprehensive plan of organizing the Regular Army. In this chapter appears section 1205, R. S.:

"Officers may be transferred from the line to the staff of the Army without prejudice to their rank or promotion in the line; but no officer shall hold at the same time, an appointment in the line and an appointment in the staff which confer equal rank in the Army. When any officer so transferred has, in virtue of seniority, obtained or become entitled to a grade in his regiment equal to the grade of his commission in the staff, he shall vacate either his commission in the line or his commission in the staff."

4. The Act of Congress, approved February 2, 1901 (31 Stat. 748), entitled "An Act to increase the efficiency of the permanent military establishment of the United States," is in effect a re-organization of the Army and the concluding section provides:

"That all laws or parts of laws inconsistent with the provisions of this act be, and the same are hereby, repealed."

Section 15, Id. (Comp. St. 1916, § 1775), provides for the organization of the Judge Advocate General's department, its personnel, for the filling of vacancies therein, and for acting Judge Advocates to be detailed from officers of the grade of captain or first lieutenant of the line who, while so serving, shall continue to hold their commissions in the arm of the service to which they permanently belong, the detail not to exceed four years.

Section 26, Id., provides inter alia:

"That so long as there remain any officers holding permanent appointments in the Adjutant General's Department, the Inspector General's Department, the Quartermaster General's Department, the Subsistence Department, the Pay Department, the Ordnance Department, and the Signal Corps, including those appointed to original vacancies * * * they shall be promoted according to seniority in the several grades as now provided by law * * * and when any vacancy * * * shall occur which cannot be filled by promotion as provided in this section, it shall be filled from details from the line of the Army. All officers so detailed shall serve for a period of four years, at the expiration of which time they shall return to duty with the line." (Comp. St. 1916, § 1905.)

This Act provides for staff officers of two classes; those appointed and holding permanent commissions in the several staff corps or departments, and those detailed from the line. The provisions providing for detail of line officers cover the identical subject-matter of section 1205, R. S., and it is demonstrable that the provisions of the

older statute cannot be reconciled with the provisions of the later and that it is impossible to give effect to both. The Act of February 2, 1901, *supra*, does not provide or authorize the commissioning of line officers in the staff corps and while so commissioned to continue to hold their line commission, but upon the contrary, provides only for details and limits the period of details of line officers in a staff corps to four years. This policy is emphasized by the Manchu Act, August 24, 1912 (37 Stat. 571).

5. The National Defense Act, approved June 3, 1916, entitled "An Act for making further and more effective the provisions for the national defense and other purposes" provides for permanent staff corps including that of the Judge Advocate General's department and contains express authority for the detailing and the conditions of detail of officers of the line of the army. It expressly limits the time of service on the general staff to four years, showing the intention on the part of Congress to continue the policy of limiting the time of line officers serving in the staff corps.

Section 8 of the National Defense Act, *supra*, provides for the Judge Advocate General's department, its permanent personnel and for the detail of Acting Judge Advocates.

The pertinent provisions of this section are as follows:

"Acting Judge Advocates may be detailed under the provisions of existing law for separate brigades and for separate general court-martial jurisdiction: * * * And provided further, that so much of the Act of Congress, approved August 24, 1912, as relates to the detachment or detail of officers for duty in the Judge Advocate General's department shall hereafter be held to apply only to acting Judge Advocates authorized by law." (Comp. St. 1916, § 1775a.)

The existing law governing the detail of Acting Judge Advocates is found in section 15, Act of February 2, 1901 (31 Stats. 751 [Comp. St. 1916, § 1775]), the applicable portion being as follows:

"* * * For each geographical department * * * of troops not provided with a judge advocate from the list of officers holding permanent commissions in the Judge Advocate General's department, one Acting Judge Advocate with the rank, pay and allowances of captain. * * *

"Acting Judge Advocates provided for herein shall be detailed from officers of the grades of captain or first lieutenant of the line of the army who while so serving shall continue to hold their commissions in the arm of the service to which they permanently belong."

These statutes contain no authority for a line officer to accept a permanent commission in the Judge Advocate General's department and retain his line commission, but upon the contrary create a personnel of the Judge Advocate General's department, one permanent of the grades and members fixed in section 8, *supra*, and the other temporary, that is, Acting Judge Advocates to be detailed from officers of the grade of captain or first lieutenant who continue to hold their commissions in the arm of the service to which they permanently belong.

6. The editorial staff of the Edward Thomson Company, in their work "Federal Statutes, Annotated, 1906," and the editorial staff of the West Publishing Company in their work "United States Compiled

Statutes, 1916," conclude that section 1205, R. S., had been superseded; i. e., repealed by implication.

The general principles touching repeals by implication in the form of rules were formulated by the court in *Winslow v. Morton*, 118 N. C. 486, 24 S. E. 417, and are quoted at length in Lewis' *Sutherland*, *Statutory Construction*, page 465, as follows:

"(1) That the law does not favor a repeal of an older statute by a later one by mere implication.

"(2) * * * A law will not be deemed repealed because some of its provisions are repealed in a subsequent statute, except in so far as the latter plainly appears to have been intended by the legislature as a substitute.

"(3) Where the later or revising statute clearly covers the whole subject-matter of antecedent acts, and it plainly appears to have been the purpose of the legislature to give expression in it to the whole law on the subject, the latter is held to be repealed by necessary implication."

7. I am of the opinion that the acceptance of commissions in the Judge Advocate General's department by the several officers whose names appear on the list submitted with your memorandum, vacated their respective commissions in the line upon the date of their several acceptances and that the acceptance of the commission can either be express or constructive by entering upon the duties under the latter commission.

[Signed] E. H. Crowder, Judge Advocate General.

40. SURGICAL OPERATION ON A SOLDIER

(A)

Articles of War XX I C 2.

2d Ind.

War Dept., J. A. G. O., October 23, 1917.—To the Adjutant General.

1. You request draft of a substitute for paragraph 53, *Compilation of Orders*, which will accord with my views in the matter, together with an expression of the views upon which such draft is based. With this request you submit a memorandum of this office for the Adjutant General under date of September 13, 1917, relating to six cases tried recently by general court-martial at Fort Mills, Corregidor Island. I therefore take it that the request grows out of the situation arising by reason of the opinion given in this memorandum.

2. In preparing the substitute paragraph hereafter submitted I have kept in mind the apparent view of the War Department with respect to the trial of soldiers for refusal to submit to surgical operation as that view is indicated in paragraph 53, *Compilation of Orders*. It has apparently been thought that when an existing disability required a treatment necessitating a serious surgical operation, the soldier himself had a right of determination superior to the claims of the Government upon his services. In time of peace it is obviously proper to defer to some extent to the wish of the soldier in cases where the proposed operation is of such seriousness as to actually involve an appreciable

risk to life. But it is necessary that a more specific rule of procedure in such cases should be substituted for the uncertain one in the existing order; for cases coming to this office disclose that the attending surgeons do not fully comprehend what is required to be done by them to place the records in such shape that if the soldier has improperly refused to submit to an operation he may be tried by court-martial. What this office regards as the proceedings necessary to be gone through with by the attending surgeon before a prosecution can be had for the refusal of a soldier to submit to a surgical operation, has been fully set out in the memorandum above referred to, and the proposed draft of a substitute for said paragraph 53 is drawn to conform to those views, and to make it certain, if possible, that court-martial proceedings, based upon a refusal of the soldier to submit to a surgical operation, will not have to be set aside by reason of failure of the attending surgeon to pursue the requisite formalities upon which a charge may be based.

I desire, however, to accentuate this: in time of war a quite different situation confronts us. In time of peace as well as in time of war, inasmuch as the Government has the right to the services of its citizens as soldiers, it necessarily has the authority to take all necessary action that will insure to it the continued services of the soldier. Although, as just said, in time of peace it may be proper to defer in matters involving risk of life to the individual wishes of the soldier, in time of war the situation is entirely changed. In time of war necessities of the service require that the individual rights or desires of the soldier shall be subservient to the public needs and the public welfare. In time of war the Government owes no duty to defer, even in the case of the most serious surgical operation, to the wishes of a soldier. I have, therefore, made the proposed substitute draft for paragraph 53 to apply only in time of peace. If this draft be adopted in this form, then the refusal of a soldier in time of war to submit to a surgical operation of any kind or sort will leave him in the same position as he now is when he refuses to submit to medical treatment, and in all such cases, without any preliminary formalities on the part of the attending surgeon, he may be tried by court-martial under the 96th Article of War.

3. In accordance with the views above expressed, I submit the following proposed substitute for said paragraph 53:

No enlisted man shall be brought to trial, or convicted and punished, for refusal in time of peace to submit to a surgical operation proposed by the attending surgeon unless (1) such surgeon shall execute a formal written certificate setting out the general nature of the proposed operation and that in his opinion such operation is without appreciable risk to the life of the soldier and is necessary for the removal of a disability then existing which prevents the full performance of any or all military duties that can properly be required of the soldier; (2) shall cause such certificate to be made a part of the records of his office; (3) shall read such certificate to the soldier; and (4) the soldier shall thereafter refuse to submit to the operation proposed in said certificate. In any such case if the attending surgeon is in doubt as to whether the proposed operation involves appreciable risk to life, the aforesaid

certificate will not be executed and the soldier will be discharged on surgeon's certificate of disability.

CJL. [Signed] S. T. Ansell, Acting Judge Advocate General.

(B)

Discipline II A.

January 25, 1918.

From: The Judge Advocate General.

To: The Division Judge Advocate, 39th Div., Camp Beauregard, La.
Subject: Refusal of enlisted men to submit to surgical operation.

1. You transmit an official opinion rendered by you on the 13th of January, for the Commanding General of the 39th Division. In the opinion you state that the regulations require that in order to make an enlisted man who refuses to submit to operation subject to court-martial, it is necessary that the surgeon certify that the operation is "without risk of life." The surgeons decline to make certificates of this nature, and insist on certifying that the operation is "without appreciable risk of life." You ask the opinion of this office as to whether or not a soldier can be tried by general court-martial for refusal to submit to an operation when the surgeon has certified that it is without appreciable risk of life.

2. Your attention is invited to section 2 of General Orders No. 167, Series 1917, which is as follows:

"In time of war if a soldier refuses to submit to operations or medical treatment, he will be examined by a board of three medical officers convened by the division commander or commander of a base hospital. If, in the opinion of the board, the operation or medical treatment advised is necessary to enable the soldier to perform properly his military duties, and he persists in his refusal after being notified of the findings of the board, he may be tried by court-martial under the 96th Article of War."

In your opinion referred to you make no reference to this order and it is presumed that you did not have it before you. This order eliminates the difficulty suggested in your opinion and prescribes the procedure necessary to give a court-martial jurisdiction of a soldier who refuses to submit to operation or medical treatment, which, in the opinion of the board, is necessary to enable him to perform properly his military duties.

[Signed] E. G. Davis, Major, Judge Advocate,
Assistant to the Judge Advocate General.

(C)

Discipline II A.

March 5, 1918.

Honorable Charles G. Edwards, House of Representatives, Washington, D. C.

My Dear Mr. Edwards: I am in receipt of your letter of the 26th ultimo, in which you ask for advice with reference to compulsory submission to physical operation in certain cases. You ask—

"If a registrant or a volunteer is suffering from hernia or some other

trouble that could be detected on examination and is observed on entrance examination into the Army and is passed into the service as physically fit and it later develops that the trouble becomes so serious that an operation is believed necessary by the Army Surgeons, what authority, if any, has the Army to force such a man to an operation?"

The present regulation with reference to this subject reads:

"In time of war if a soldier refuses to submit to operations or medical treatment, he will be examined by a board of three medical officers convened by the division commander of a base hospital. If, in the opinion of the board, the operation or medical treatment advised is necessary to enable the soldier to perform properly his military duties, and he persists in his refusal after being notified of the findings of the board, he may be tried by court-martial under the 96th Article of War [Comp. St. 1916, § 2308a]." G. O. 167, W. D. 1917.

It must be conceded that the Government has the right to demand the services, in time of war, of any of its citizens, whether physically fit or not. If a man not physically fit is called into the service of the country the Government has the right to take any measures, short, at least, of those which involve danger to life, which may be necessary to restore the man to a proper physical condition. This office has uniformly upheld the right of the Government to require any officer or enlisted man in the service to submit to a physical operation which the Medical Department would certify was without danger to life. The present case should be no exception to this general rule. If the man is in the service and is physically disqualified to render full duty, and if such disqualification can be removed by an operation which does not involve, in the opinion of the Medical Officers concerned, danger to life, then I see no reason for holding that he can not be required to submit to such operation or punished for refusal so to submit. The fact that the man might have been rejected if there had been a more rigid examination upon admission to the service cannot be held to affect the rights of the Government in his case.

[Signed] E. H. Crowder, Judge Advocate General.

(D)

Discipline II A.

April 9, 1918.

From: The Office of the Judge Advocate General.

To: The Division Judge Advocate, _____, _____.

Subject: Submission to surgical operation.

1. Your communication of March 27th involves the question whether under General Orders No. 18, War Department, 1918, which supercedes General Orders No. 167, War Department, 1917, the certificate made by the medical board must certify that the operation is without appreciable risk to life. General Orders No. 18, War Department, 1918, suspended the provisions of paragraph 53, Compilation of Orders, and of paragraph 220, Manual for the Medical Department, during the present emergency, and provides further:

"In time of War if a soldier refuses to submit to dental or surgical operations, or dental or surgical treatment, he will be examined by a board of three medical officers convened by the department or division

commander or commander of a base hospital. If, in the opinion of the board, the said operation or medical or dental treatment advised is necessary to enable the soldier to perform properly his military duties, and he persists in his refusal after being notified of the findings of the board, he may be tried by court-martial under the 96th Article of War [Comp. St. 1916, § 2308a]."

2. Under this regulation the Medical Board is not now required to certify that the operation or treatment is without appreciable risk to life, and the specification need not contain an allegation to this effect.

The purpose of the regulation is to require soldiers to submit to necessary and reasonable operations and treatment in order to fit them for the performance of military duty. If the soldier refuses to submit upon proper request, in order to lay the foundation for trial by court-martial, he must be examined by a board of three medical officers properly convened. All of the members of the medical board must make a thorough and personal examination, and concur in the result. The regulation recites that—

"If, in the opinion of the board, the said operation or medical or dental treatment advised is necessary to enable the soldier to perform properly his military duties," etc.

This implies that the soldier is suffering from some ailment or disability which presently does or in the future may unfit him to properly perform his military duties, and that the reasonably probable result of the operation or treatment will be to fit him to perform such duties. The report of the medical board that an operation or medical or dental treatment is necessary implies that all members of the board have made a personal examination, have diagnosed the ailment or disability of which the soldier is suffering, and concur in the opinion that the treatment or operation described will probably result in fitting the soldier to perform his duties as such fully, or in a measurably larger degree than without such operation or treatment.

Obviously, the medical officers must exercise their discretion and their professional skill in diagnosing the disease or disability of the soldier, and in determining the probability of recovery, and whether or not the operation or treatment is likely to make the soldier more capable of fully performing his proper duties.

3. The findings or report of the medical board are not conclusive upon the soldier. He may, if he can, show that he is not suffering from the ailment or disability alleged, or he may show that it in no wise unfits him, and in the ordinary course of events would not unfit him in the future, to perform his duties as a soldier as fully as if the treatment was administered or the operation performed, or that the operation will not reasonably or probably fit him for military service, or any other facts constituting a defense to the charge.

The regulation is not intended to encourage or to authorize indiscriminate surgical operations, but only such as are justified by the experience of the profession of surgery and bear some obvious and reasonable relation to the health, safety and capacity of the soldier to perform military service.

[Signed] S. T. Ansell, Acting Judge Advocate General.

(E)

Discipline II A.

May 13, 1918.

From: The Office of the Judge Advocate General.

To: The Division Judge Advocate, 85th Division, Camp Custer, Battle Creek, Michigan.

Subject: Monthly Report.

1. In your monthly report dated May 6, 1918, you state the following case:

A soldier alleged to be suffering from a physical infirmity, was examined by a Medical Board under G. O. No. 18, W. D. 1918, which reported that a surgical operation was necessary to enable him to perform properly his military duties. After being notified of the findings of the board, he persisted in his refusal to submit to the operation. He was tried for violation of the 96th Article of War [Comp. St. 1916, § 2308a] and acquitted because of testimony by one of said board that the operation was not necessary to enable the accused to perform properly his military duties.

You inquire whether, without violating the 40th Article of War, a new board may be convened and the soldier tried again for refusal to submit to an operation certified by the new board to be necessary in order to enable him to perform properly his military duties.

2. It is clear that if such new board is convened, and certifies that a surgical operation is necessary to enable this soldier to perform properly his military duties, and he persists in his refusal to submit to such operation, he will be guilty of a fresh violation of the 96th Article of War and cannot plead the 40th Article of War in bar thereof. On the other hand, in the prior case, it was determined by the court martial that the alleged infirmity was not in fact sufficient to require an operation in order to enable him to perform properly his military duties. Consequently, as a matter of orderly administration, no new board should be convened unless there is shown to have been, or until sufficient time has elapsed to raise a reasonable presumption that there has been, some change in the situation as to the development of the disease or infirmity, or as to the character of military duties required to be performed.

[Signed] H. M. Morrow,
Lieutenant Colonel, Judge Advocate Executive Officer.

41. DISCHARGE OF REGULAR ARMY OFFICER FROM TEMPORARY
COMMISSION

Office IV E.

May 13, 1918.

Memorandum for the Chief of Field Artillery.

1. By your memorandum dated May 1, 1918, you ask for an answer to four specific questions. These questions will be answered in the order in which they appear.

2. Can an officer holding a temporary commission in the Regular Army giving him higher rank than his permanent commission be dis-

charged from such commission for inefficiency? If so, what proceedings are necessary to accomplish his discharge?

Speaking specifically, there is no law which provides that such an officer may be discharged from his temporary office for "inefficiency." This office, however, in an opinion dated April 9, 1918 (Ops. J. A. G. 210.8), held that "an officer of the Regular Army who has been given a temporary promotion in the Regular Army under section 8 of the Act of May 18, 1917 [40 Stat. 76], can be discharged from this office by the President under section 9 of the same Act," for any cause which, in the judgment of the President, would promote the public service. It is apparent, therefore, that it is within the power of the President to make such discharge as is contemplated by this question, and that, if he sees fit, he may name the cause therefor as "inefficiency," although he would not be bound to name any specific cause whatsoever.

It might be thought that the latter part of the provisions of said section 9, providing for the appointment and functioning of an examining board, would be applicable to the case of the class of officers mentioned. Such, however, is not the fact. That entire section reads as follows:

"Sec. 9. That the appointments authorized and made as provided by the second, fourth, fifth, sixth and seventh paragraphs of section one and by section eight of this act, and the temporary appointments in the Regular Army authorized by the first paragraph of section one of this act shall be for the period of the emergency unless sooner terminated by discharge or otherwise. The President is hereby authorized to discharge any officer from the office held by him under such appointment for any cause which, in the judgment of the President, would promote the public service; and the general commanding any division or higher tactical organization or territorial department is authorized to appoint from time to time military boards of not less than three nor more than five officers of the forces herein provided for to examine into and report upon the capacity, qualification, conduct, and efficiency of any commissioned officer within his command other than officers of the Regular Army holding permanent or provisional commissions therein. Each member of such board shall be superior in rank to the officer whose qualifications are to be inquired into, and if the report of such board be adverse to the continuance of any such officer and be approved by the President, such officer shall be discharged from the service at the discretion of the President with one month's pay and allowances."

We are now speaking with reference to an officer of the Regular Army who is holding a temporary commission in the Regular Army in a grade higher than that of his permanent commission. The only way in which this situation can be brought about is through the provisions of section 8 of said act which read:

"Vacancies in all grades in the Regular Army resulting from the appointment of officers thereof to higher grades in the forces other than the Regular Army herein provided for, shall be filled by temporary promotions and appointments in the manner prescribed for filling temporary vacancies by section 114 of the National Defense Act."

The Efficiency Board authorized by the latter part of section 9 is without authority to inquire into any charges preferred against an officer of the class we are now considering, for the language of the statute is: "To examine into and report upon the capacity, qualifications, conduct and efficiency of any commissioned officer within his command, other than officers of the Regular Army, holding permanent or provisional commissions therein."

This clause clearly excludes from the jurisdiction of efficiency boards a Regular Army officer who is holding a temporary commission in the Regular Army in a grade higher than that held under his permanent commission. The language of the excluding clause alone is sufficient to produce this result. The class of officers being considered are, although holding temporary commissions in the Regular Army, nevertheless holding permanent commissions in the Regular Army at the same time; for it is provided by section 114 of the National Defense Act (Comp. St. 1916, § 1908a) that officers temporarily promoted under the provisions thereof, shall not vacate their permanent commissions. Even with the language not as clear as it is, it would be absolutely essential to hold that the excepting clause excluded all but temporary officers of the Regular Army, or to hold that section 9, by implication, repealed the 118th Article of War (Comp. St. 1916, § 2308a); for the last sentence of section 9 provides that, if the report of the board be approved by the President, "such officer shall be discharged from the service." Discharge from the service is quite different from discharge from the office held under temporary appointment. The latter still leaves him in the service, the former separates him entirely from the service. Therefore, as repeals by implication are not favored, it would be necessary, under a fundamental rule for the construction of statutes, to hold that the efficiency board would not have jurisdiction over officers of the class here being considered, even though the language of section 9 indicated less clearly than it does that only a temporary Regular Army officer is subject to examination for efficiency by the board authorized by section 9.

3. If an officer should be discharged from his temporary rank in the Regular Army for inefficiency, would he be available for future temporary, or National Army promotion?

In answering the first question I have stated that, specifically, an officer of the class considered may not be discharged for inefficiency, but that the President, under the broad powers given him by section 9 of the Selective Service Act, might, in discharging such an officer from his temporary commission, if he saw fit, name the cause therefor as inefficiency. Only in the event that the President so proceeded could a situation arise to which your second question could apply.

In an opinion of this office, dated November 17, 1917 (Ops. J. A. G. 210.2), it was held that when an officer of the Regular Army, who has been appointed to an office of higher grade in the temporary forces, has been discharged therefrom for inefficiency, it is within the power of the Department to prescribe how long such an officer shall remain ineligible for temporary promotion in the regular establishment, and upon what conditions he shall become eligible for such promotion. This situation, and that covered by the present question are of a like

nature, and require like treatment. It may, therefore, be said that if a Regular Army officer be discharged by the President from his temporary rank in the Regular Army for inefficiency, it is within the power of the Department to prescribe how long such officer shall remain ineligible for further temporary promotion in the Regular Army, or for appointment to a higher grade in the temporary forces. The Department has not promulgated a General Order upon the subject.

4. Can an officer holding a temporary commission in the Regular Army giving him higher rank than his permanent commission be discharged as a disciplinary measure from his temporary commission? If so, what proceedings are necessary to accomplish his discharge?

This question must be answered in the negative. We have observed that the efficiency board authorized by section 9 of the Selective Service Act has no jurisdiction in cases involving officers holding permanent commissions in the Regular Army. Aside from this provision, the only other law authorizing the discharge of an officer, whether in the Regular Army or in any other force of the Army of the United States, is the 118th Article of War. By virtue of its provisions, no officer, in time of peace, may be discharged or dismissed from the service except by sentence of a general court-martial and, in time of war, except by sentence of general court-martial, or by order of the President. However, if his discharge be by order of the President, such officer is entitled, under section 1230, R. S. (Comp. St. 1916, § 2003), to subsequently demand, and receive, a trial by court-martial. It is manifest, therefore, that without the officer's consent he may not be dismissed from the service, at any time, without a trial by court-martial; and there is no provision of law to be found anywhere, outside of section 9 of the Selective Service Act, which authorizes the discharge of an officer of the Regular Army, merely from an office of higher grade therein held temporarily. Unless the discharge be made under said section 9, therefore, no discharge may be accomplished except under the provisions of the 118th Article of War, and a discharge under those provisions is a discharge from the service.

In making the foregoing assertions I do not overlook the power of the President, under section 9 of the Selective Service Act, to discharge an officer appointed to temporary office, in accordance with the terms of said act, "from the office held by him under such appointment, for any cause which, in the judgment of the President, would promote the public service." Under this provision, of course, the President may discharge such an officer for any reason that seems to him to be for the good of the service. Actually, therefore, the President may discharge such an officer for a cause which would be a proper basis for a court-martial proceeding. Viewing the matter from this standpoint, the answer to the question would be that such officer may be discharged by the President from his temporary commission as a disciplinary measure. The question, however, does not seem to contemplate this, because it subsequently asks, "If so, what proceedings are necessary to accomplish his discharge?" and where such discharge is by the President, no "proceedings" are necessary. It is a case of discharge without proceedings, though, of course, the matter must in some way be brought to the President's attention.

5. If an officer (such as is contemplated by the former question) should be discharged from his temporary rank in the Regular Army, as a disciplinary measure, would he be available for future temporary, or National Army promotion?

As I have answered that such an officer may not be discharged as a disciplinary measure, from his rank in the Regular Army, without at the same time discharging him entirely as an officer, it becomes unnecessary to answer this last question. Considering it, however, on the basis of a discharge by the President, under section 9 of the Selective Service Act, the officer's future situation would naturally lie entirely within the control of the President, who, if he had in fact dismissed the officer from his temporary office because of misconduct, would hardly be inclined to subsequently give him a new appointment involving added rank.

6. It is difficult to make full and comprehensive answer to general questions. It is particularly difficult to make answer to questions 3 and 4 here being considered, because of their failure to limit their application to a specific case. Neither question should really be considered as applying to a case which is covered by the President's authority in section 9 of the Selective Service Act, yet it is unsafe to answer either of these questions without specifically pointing out the President's power under said section 9. In the answers to these questions, as well as to the others, it should be kept steadily in mind that their scope must be confined to the facts with which their statement is herein associated.

[Signed] James J. Mayes, Acting Judge Advocate General.

42. DENTAL CORPS, BASIS OF COMPUTING NUMBER OF OFFICERS

1st Ind.

War Department, J. A. G. O., May 23, 1918—To the Adjutant General.

1. By the papers in reference two questions are to be determined:

(a) Whether in computing the number of dental officers to be permanently commissioned in the Dental Corps there shall be taken as the basis of computation the enlisted strength only or shall there be included also officers, civilian employees and the Medical Department.

(b) Is it necessary in recommissioning officers who were in active service at the time of the approval of the Act to reappoint them and have their reappointments confirmed by the Senate?

2. The Act of Congress approved October 6, 1917 (40 Stat. 397), provides with reference to the number of commissioned men in the Dental Corps:

"Hereafter the Dental Corps of the Army shall consist of commissioned officers of the same grade and proportionally distributed among such grades as are now or may be hereafter provided by law for the Medical Corps, who shall have the rank, pay, promotion and allowances of officers of corresponding grades in the Medical Corps,

including the right to retirement as in the case of other officers, and there shall be one dental officer for every thousand of the total strength of the Regular Army authorized from time to time by law: Provided further, that dental examining and review boards shall consist of one officer of the Medical Corps and two officers of the Dental Corps: Provided further, That immediately following the approval of this Act all dental surgeons then in active service shall be recommissioned in the Dental Corps in the grades herein authorized in the order of their seniority and without loss of pay or allowances or of relative rank in the Army: And provided further, That no dental surgeon shall be recommissioned who has not been confirmed by the Senate."

Section 10 of the National Defense Act of June 3, 1916 (39 Stat. 166, 171 [Comp. St. 1916, § 1807a]), provides in part as follows:

"The Medical Corps shall consist of commissioned officers below the grade of brigadier general, proportionally distributed among the several grades as in the Medical Corps now established by law. The total number of such officers shall approximately be equal to, but not exceed, except as hereinafter provided, seven for every one thousand of the total enlisted strength of the Regular Army authorized from time to time by law. * * *

2. The provision relating to the basis of computation for officers in the Medical Corps and defining "enlisted strength" has been thoroughly considered in an opinion of this office dated April 3, 1918, in which it is held:

"It is therefore the opinion of this office that the strength which should form the basis for computing the number of medical officers to be permanently promoted in the Medical Corps in the present emergency is that described in sub-paragraph (c) of paragraph 3, of this opinion. According to figures furnished by the office of the Adjutant General this strength is as follows:

Infantry	127,985
Cavalry	37,173
Field Artillery	26,748
Coast Artillery	30,009
Engineers	7,945
Quartermaster Corps	15,000
Signal Corps	7,179
Ordnance Department.....	1,373
Philippine Scouts.....	5,733
Miscellaneous organizations and special allowances.....	7,777
Unassigned recruits (2 per cent. of the sum of the foregoing and the authorized enlisted strength of the Medical Corps—14,304).....	19,686
Total	286,610

"Conformably to law, the enlisted strength of the Medical Department is not included in this computation, except in computing the authorized number of unassigned recruits."

This office is advised by the Adjutant General that there has been no change in these figures since the date of that opinion. The first question herein is whether there should be added to the enlisted strength the officers of the Regular Army, the enlisted force of the Medical Department, and such "civilians as the President may pre-

scribe." The composition of the Regular Army is defined by the National Defense Act, which gives in detail the component parts thereof. Among other things it is provided in section 3 of that Act that

"A brigade, a division, an army corps, and an army headquarters, shall consist of such officers, enlisted men, and civilians as the President may prescribe." Comp. St. 1916, § 1758a.

Further provision is made for the including in the Regular Army of other officers. Section 2 of the National Defense Act, *supra*, makes the Medical Department a part of the Regular Army but the enlisted force of such department is not included in the effective strength of the Army nor counted as a part of the enlisted force provided by law. Sec. 10. There is a marked distinction between the basis of computation for the appointment of officers in the Medical Corps and for the appointment of officers in the Dental Corps as provided by the Act of October 6, 1917, in that the Medical Corps computation is based upon "the total enlisted strength" while the Dental Corps computation is based upon the "total strength" of the Regular Army. The "total strength" clearly includes the officers of the Regular Army, such civilians hereinbefore referred to as the President may have prescribed, and the enlisted force of the Medical Department, in addition to the enlisted strength used as a basis for computation in fixing the number of officers in the Medical Department as above referred to. This office is, therefore, of the opinion that the "total strength" of the Army and not merely the total enlisted strength should be used as the basis of the computation of the number of officers to be permanently commissioned in the Dental Corps.

4. Answering the second question: Article 2, of the Constitution, section 2, clause 3, provides that:

"The President shall have power to fill up all vacancies that may appear during recess of the Senate by granting commissions which shall expire at the end of their next session."

And section 3 provides that the President "shall commission all the officers of the United States." The proviso of the Act of October 6, 1917, does not require that the dental surgeons shall be re-appointed but that they be recommissioned. A commission is but the evidence of an appointment. It was held in an opinion by the Court of Claims in *O'Shea v. United States*, 28 Ct. Cl. page 400, that the only express statutory provisions as to the form of commission relate to civilian commissions alone; and that the commission, whatever its form, is but an evidence of the fact that the President has exercised his constitutional power of appointment. The law is well settled that an appointment is complete as soon as the appointing power has designated the person chosen to fill the office. An appointment is nothing more than a choice by the appointing power, in the exercise of an executive discretion, of the person to be appointed. The issuance of a commission, while it evidences the appointment, is but a ministerial act. After the act of appointment is completed the power of the appointing authority is exhausted, and when the appointing power has once exercised this function it has

no more control and cannot revoke the appointment and substitute another in its place. It has no authority to rescind and this is especially true where the appointee has signified his acceptance or has done any act in recognition thereof.

5. By the Act of October 6, 1917, *supra*, no new appointment is provided for. The reference in the last proviso, "that no dental surgeon shall be recommissioned who has not been confirmed by the Senate" refers to the recommissioning directed in the preceding proviso, "that immediately following the approval of this act all dental surgeons then in active service shall be recommissioned in the Dental Corps in the grades herein authorized in the order of their seniority and without loss of pay and allowances or of relative rank in the Army: And provided further, That no dental surgeon shall be recommissioned who has not been confirmed by the Senate."

This presupposes an appointment. The appointment may have been confirmed or unconfirmed. It was clearly the intention of Congress to prohibit the recommissioning of an unconfirmed prior appointment.

There are four things involved in the acquiring of the status of an officer or changing his grade: appointment, acceptance, confirmation, and commissioning. Each step has a definite and distinct meaning. The appointment is the essential and necessary step, the commissioning a purely ministerial act and not necessary to the validity of the appointment.

The officers of the Dental Corps appointed under the Act of June 3, 1916, had their names sent to the Senate for confirmation and were confirmed. It was not necessary for those officers whose appointments had theretofore been made and confirmed by the Senate to be reappointed, although the Act of October 6, 1917, required them to be recommissioned.

The Act of May 3, 1911 (36 Stat. 1054), provided for a dental corps composed of dental surgeons with the rank of first lieutenants and acting dental surgeons without rank. The National Defense Act, *supra*, authorized the President to appoint and commission a limited number of dental surgeons with the rank, pay and allowances of lieutenants, captains, and majors. By the Act of October 6, 1917, *supra*, the number of available appointments was increased by changing the basis of computation from the "enlisted men of the line" to the "total strength" of the Army and abolishing the restriction placed upon the number of captains and majors to be appointed. This act did not provide, as did the National Defense Act, for the appointment, but only for the commissioning, of officers. It provided for the recommissioning of dental surgeons as commissioned officers in the grades authorized therein and in order of seniority without loss of pay, allowance or relative rank, thus giving to such dental surgeons a more distinctive military title but in no respect changing the office, duties or pay. The National Defense Act, *supra*, gave them the office of dental surgeon with the pay and rank of lieutenants, captains and majors, while the Act of October 6, 1917, *supra*, established them as commissioned officers, instead of as dental surgeons with rank, pay and allowance of commissioned officers. It gave a new name to the

same office, requiring a new commission under the Act, but no new appointment.

I am of the opinion that the Act of October 6, 1917, *supra*, does not require the dental surgeons who were in the service on the passage of the Act and whose appointment had theretofore been made and confirmed by the Senate to be again reappointed. Commissions conforming to the change of title given to their offices by the Act should, however, be issued to them.

[Signed] James J. Mayes, Acting Judge Advocate General.

43. DISCHARGE AND RETIREMENT OF DENTAL CORPS OFFICER
Discharge XVII B.

19th Ind.

War Department, J. A. G. O., May 23, 1918.—To the Adjutant General.

1. By the preceding indorsement the Adjutant General has submitted to this office for remark a request of the Surgeon General for a decision as to whether in view of the failure of First Lieutenant ———, Dental Corps, National Guard, to qualify professionally in an examination for promotion to the grade of captain, he must be honorably discharged and given a year's pay under the Act of April 23, 1908 (35 Stat. 66 [Comp. St. 1916, § 1807]).

2. The papers show that on January 22, 1918, Lieutenant ——— applied to the Surgeon General for promotion under authority of the Act of October 6, 1917 (40 Stat. 397). It appearing that he had completed the requisite service to entitle him to examination for promotion under General Orders 168, W. D., 1917, a board of medical officers was convened to examine him, and the result of the examination was a finding that he was not professionally qualified for promotion. This finding was reviewed by another board, and confirmed.

3. By the Act of October 6, 1917 (40 Stat. 397), Congress removed the limitations imposed by the Act of April 23, 1908, and Section 10 of the National Defense Act of June 3, 1916 (Comp. St. 1916, § 1815a), against promotion of first lieutenants, Medical Corps, to Captain only after three or five years service respectively by enacting that during the existing emergency first lieutenants in the Medical Corps of the Regular Army and of the National Guard shall be eligible to promotions as captain upon such examination as may be prescribed by the Secretary of War. This was the sole purpose of the said Act as the bill was first passed by the House and introduced in the Senate. On the floor of the Senate there was introduced the amendment relating to the Dental Corps, reading as follows:

"Hereafter the Dental Corps of the Army shall consist of commissioned officers of the same grade and proportionally distributed among such corps as are now or may be hereafter provided by law for the Medical Corps, who shall have the rank, pay, promotion and allowances of officers of corresponding grades in the Medical Corps, including the right to retirement as in the case of other officers, and there shall be one dental officer for every thousand of the total strength of the Reg-

ular Army authorized from time to time by law: Provided further: That dental examining and review boards shall consist of one officer of the Medical Corps and two officers of the Dental Corps: Provided further, That immediately following the approval of this Act all dental surgeons then in active service shall be re-commissioned in the Dental Corps in the grades herein authorized in the order of their seniority and without loss of pay or allowances or of relative rank in the Army: And provided further, That no Dental Surgeon shall be re-commissioned who has not been confirmed by the Senate."

The purpose and effect of this provision was to place officers of the Dental Corps of the Army upon the same plane as respects rank, pay, promotion, allowances, and right to retirement as officers of the Medical Corps. It superseded the provision in section 10 of the National Defense Act of June 3, 1916, relating to Dental Surgeons. It applies primarily only to the Regular Army, and authorizes one dental officer for every one thousand of the total strength of the Regular Army authorized from time to time by law, proportionally distributed among the different grades as provided by law for the Medical Corps. It applies to National Guard officers only to the extent that may be consistent with their temporary status in the Federal service. While in the Federal service National Guard officers are subject to promotion under the same conditions as to examination as govern in the case of officers of the Regular Army. This means that a first lieutenant of the Dental Corps, National Guard, in the Federal service is entitled under the Act of October 6, 1917, to promotion subject to such examination as is prescribed by the Secretary of War for the promotion of first lieutenants in the Medical Corps. By the Regulations (G. O. 168, W. D., 1917) it is required that such lieutenant shall have had a certain period of active service. The legislation under consideration does not, in the opinion of this office, mean that the officers of the National Guard either in the Medical Corps or in the Dental Corps, are entitled to the benefits of all of the provisions of the Act of April 23, 1908, relating to promotions in the Medical Corps. The provisions of that Act, as viewed by this office, and as stated above, apply primarily to the officers of the Regular Army, and are applicable to officers of the National Guard only so far as is consistent with their temporary status. The Act of 1908, it will be observed, provides that should any member of the Medical Corps fail in his physical examination and be found incapacitated for service by reason of physical disability contracted in the line of duty, he shall be retired with the rank to which his seniority entitled him to be promoted. Evidently, this provision is not applicable to National Guard officers. Congress has never directly authorized the retirement of National Guard officers from the Federal service, and, I think, it would require more certain evidence of an intention to confer this right on officers of the Medical and Dental Corps than is indicated in any laws thus far enacted. So, also, with respect to the provision for the honorable discharge of a first lieutenant or captain who fails in his examination for promotion for any other reason than physical disability contracted in line of duty, that such officers shall be discharged from the service with one year's pay. It is the view of this office that this does not apply to National Guard officers, but only

to officers of the Regular Army. Such provision is not consistent with the temporary status of National Guard officers in the Federal service.

4. In the present case Lieutenant ——— has been found disqualified professionally for promotion. It does not follow that he must be discharged. In the opinion of this office, he may be retained in the service in the grade of first lieutenant, or he may be discharged under the provisions of Section 9 of the Act of May 18, 1917 (40 Stat. 62), which authorizes the President to discharge all classes of officers therein indicated, including National Guard officers, "for any cause which, in the judgment of the President, would promote the public service." Upon his discharge under this provision Lieutenant ——— would not be entitled to any extra pay; unless the discharge should be based upon the approved finding of a board which reports adversely to his continuance in the service, when he would be entitled to one month's pay and allowances.

[Signed] James J. Mayes, Acting Judge Advocate General.

44. ASSESSMENT OF GROUP DAMAGES UNDER A. W. 105

1st Ind.

War Department, J. A. G. O., May 29, 1918.—To the Division Judge Advocate, 40th Division, Camp Kearny, California.

1. In your letter of May 17, 1918, in the matter of assessment of damages against soldiers under the 105th Article of War (Comp. St. 1916, § 2308a), where the particular soldiers or the particular organization to which they belong can not be determined so that the assessment would have to be made against the entire command, you suggest the advisability of having the damages paid by the Division Exchange, the surplus of which belongs in the form of dividends to the men of the command. In this way, as you point out, much clerical work would be saved.

2. In a report of this office, dated April 6, 1918 (AGO—153, Misc. Div.), in a case where it was found impossible to determine the individual soldiers who were responsible for the damages, or the particular command to which they belonged, it was said:

"Within reasonable limits, it matters little just how such assessments as are contemplated by Article 105 are collected. In some instances funds in small amounts have been raised by deduction from the funds of the post exchange."

Owing to the practical difficulties in assessing the damages against the pay of the individual soldiers, of an entire command, it would seem that where the board finds that the damages were committed by soldiers belonging to the command, but is unable to more definitely locate the responsibility, the damages may be collected from the proceeds of the post exchange in which the entire command is interested.

[Signed] James J. Mayes, Acting Judge Advocate General.

45. ALLOTMENT OF PAY FOR LIBERTY BONDS—EFFECT OF DESERTION

4th Ind.

War Department, J. A. G. O., May 29, 1918.—To the Adjutant General.

1. The opinion of this office is requested whether the desertion of a soldier works a forfeiture of the amount he has paid on Liberty Bonds through monthly allotments of portions of his army pay. This question is raised in connection with a letter transmitted to this Department by Senator Gore from Mr. J. T. Bowers, Castle, Oklahoma, who writes to Senator Gore in regard to this son, Riley W. Bowers, who, it appears, deserted February 24, 1918. Mr. Bowers states that his son had subscribed for a Liberty Bond in his (the father's) name, and had paid \$60.00 on it. He inquires whether he can get the bond by paying the remainder.

2. Soldiers are permitted to make monthly allotments of their pay to apply on Liberty Bonds subscribed for by them by authority contained in Bulletin No. 41, W. D., July 12, 1917. The statutory authority for such action is section 16 of the Act of March 2, 1899 (30 Stat. 981 [Comp. St. 1916, § 2169]), which authorizes the Secretary of War "to permit enlisted men of the United States Army to make allotments of their pay, under such regulations as he may prescribe, for the support of their families or relatives, for their own savings, and for other purposes, during such time as they may be absent on distant duty, or under other circumstances warranting such action."

The provisions of Bulletin No. 41, July 12, 1917, on this subject are as follows:

"I. The provisions of paragraph 1347, Army Regulations, which restrict allotment privileges to soldiers serving within the boundaries of the United States to the support of their families and relatives are waived in the cases of enlisted men who desire to make allotments of pay in favor of banking institutions for the purpose of purchasing Liberty loan bonds. This waiver is made with the specific understanding that the men will not request discontinuance of the allotments prior to the date when they expire by limitation. The allotments will contain the notation 'Purchase of Liberty Loan Bond.'"

It will be observed that the soldier is permitted to make an allotment of his pay in favor of banking institutions for the purchase of Liberty loan bonds. The money so allotted is not money deposited by the soldier with the United States, but is deposited to his credit in a bank through which his bond is purchased. After the money is paid over by the United States to the bank, the Government has no further jurisdiction over it as pay of a soldier, any more than it would have over an allotment paid to his wife or other dependent relative. The bank through which the subscription to the bond is made pays to the Government the deferred payments on the bond according to the Government's plan of payment, and continues the soldier's account until he pays for the bond in full or until some other proper disposition is

made of the account. The bank is fully protected by the possession of the bond and the amount which the soldier has paid on it. While subscribers through the bank plan are supposed to make monthly payments of a stipulated percentage, it is not understood that failure to make payment at a designated time works a forfeiture of previous payments in favor of the bank.

3. For the reasons stated, this office is clearly of opinion that the desertion of a soldier does not work a forfeiture of the amount he has paid through allotments on Liberty bonds purchased through banks. In the present case it is recommended that Senator Gore be advised accordingly, with the further suggestion that Mr. Bowers be informed that he may apply to the bank through which the subscription to the Liberty bond was made for an adjustment. The Quartermaster Corps should furnish information as to the bank through which the bond was purchased.

[Signed] James J. Mayes, Acting Judge Advocate General.

46. CIVIL ACTION BY SOLDIER AGAINST CIVILIAN

2d Ind.

War Department, J. A. G. O., June 1, 1918.—To the Adjutant General.

1. There is referred to this office a letter from the Hon. E. E. Denison, stating that a young man from his district, who is in the military service, was recently injured by a civilian driving an auto truck against him. Inquiry is made as to whether this soldier has a right to bring an action in the civil courts for damages while he is in the military service; whether he will lose any rights by delay in bringing such action; whether he is entitled to compensation as for injury received in the military service; and to whom and when he should make application for such compensation.

2. (a) There is no law or regulation preventing a soldier from bringing a civil action to recover for personal injuries, but it must be understood that under ordinary circumstances it would be difficult for him to secure a furlough for the purpose of attending court and prosecuting his claim therein. The private rights of individual soldiers can not, of course, be permitted to interfere with the requirements of military service. If it is apparent that this soldier will be physically incapacitated for service there can be no objection to his bringing the action while he is in the service and prosecuting it after his discharge therefrom. (b) Under section 205 of the Soldiers' and Sailors' Civil Relief Act (Pub. 103, 65th Cong.) it is expressly provided that the period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by any person in the military service. Consequently this soldier would lose no rights by delaying to bring action for his personal injury. (c) While the soldier is in the military service, he is not entitled to any compensation under the terms of the War Risk Insurance Act of October 6, 1917 (40 Stat. 398). If, however, a discharge is granted to him on account of disability incurred in line of du-

ty, he will be entitled to the compensation provided therefor in article III thereof. He may, however, be required by the Director of the Bureau of War Risk Insurance under section 313 of the Act, to assign his cause of action against the person causing his injury, as a condition of receiving compensation. So long as he is in the military service, he cannot make any claim for compensation. Immediately upon his discharge he should make claim setting out all facts to the Bureau of War Risk Insurance, Division of Military and Naval Insurance. By taking the matter up directly with that Bureau after such discharge, he will be informed whether he is entitled to any compensation and the terms and conditions upon which such compensation will be granted.

[Signed] James J. Mayes, Acting Judge Advocate General

47. DECEDENT SOLDIERS' ESTATES

(A) Wills.

5th Ind.

War Department, J. A. G. O., March 11, 1918.—To the Adjutant General.

1. The propriety of creating an Estates Branch to administer estates of deceased persons subject to military law was submitted to Lieutenant Colonel Kreger, Lieutenant Colonel Wambaugh, and Major Rand. Lieutenant Colonel Kreger, with the concurrence of the other two officers, made a report that such a branch ought not be established until the experience abroad proves it to be necessary.

2. Every member of the forces should be told that in case of his death without a will his land will go to his wife and relatives in accordance with the laws of the state where the land is, and that his other property will go to his wife and relatives in accordance with the laws of the state where he himself is a permanent resident. He should be told also that the laws dividing estates of deceased persons are reasonable. Finally, he should be told that if he wishes to make his will he ought to consult some lawyer of his own state or the judge advocate of his division.

3. As the requirements of the states vary greatly, no one form for executing and attesting wills can be framed. The number of witnesses varies from state to state, and there are a few states in which a seal is necessary—though even for those states it is enough to affix a wafer or a scrap of gummed paper such as a piece of a postage stamp. The requirement most difficult to follow is the one found in most states to the effect that the testator's signature or mark must be affixed in the actual presence of each witness and that the witnesses must sign in his actual presence and in the actual presence of each other.

4. The requirements in Louisiana are so intricate that no one but a Louisiana lawyer can superintend the making of a Louisiana will safely.

The following form of will satisfies the legal requirements of all States, except Louisiana:

This is the last will of John Smith, of Cincinnati, Ohio, a private in Company A of the 750th Infantry. I revoke all other wills. I give to my wife Henrietta Smith One Thousand Dollars and the farm on which we live. I give to each of my children One Hundred and Fifty Dollars. The rest of my property I give to my wife. I name my wife and William Smith executors of this will, without surety.

Signed and sealed this 10th day of April 1918, at Paris, France.

John Smith. [Seal.]

Signed and sealed by John Smith in our presence, and by him declared to be his last will this 10th day of April, 1918, in testimony whereof at his request and in his presence and in the presence of each other we do now sign as witnesses the day and year aforesaid.

William H. Clay, Sergt., Company A, 750th Infantry,
186 Vine St., Cincinnati, O.

Samuel Jones, Corp., Co. A., 750th Infantry,
18 Brown St., Dayton, O.

Henry S. Washington, Pvt., Co. A, 750th Infantry,
99 Front St., Newport, Ky.

5. Division Judge Advocates should familiarize themselves with the 112th Article of War and with paragraphs 163-166 of the Army Regulations, to the end that upon the death of persons subject to military law proper advice may be given to the officers concerned in securing the effects. It is important to notice that, as paragraph 163 of the Army Regulations says, there is at present no authority to pay the debts of deceased soldiers.

[Signed] E. H. Crowder, Judge Advocate General.

(B)

Personal Effects of Decedent—To Whom Delivered.

2d Ind.

War Department, J. A. G. O., June 24, 1918.—To the Adjutant General.

1. The Adjutant General by the preceding indorsement requests the views of this office in connection with the following questions propounded by the Commanding Officer, Walter Reed General Hospital:

"(a) In a case where a relative is present at time of death, will the signature of an affidavit in the form attached hereto be sufficient evidence that this relative is the legal representative of deceased? In this connection, attention is called to the fact that in several cases relatives have been at this hospital at time of death of soldiers and in most cases have asked that the personal effects be turned over to them immediately and in these cases of course (due to the fact that the soldier has just died a short time before) no executor or administrator has been appointed.

"(b) In a case where a person is at the hospital at time of death who represents a relative, would the signature of an affidavit stating that this person (who is at the hospital at time of death) is authorized to represent the legal representative of deceased soldier and is

authorized by said legal representative to receive the personal effects of deceased, be sufficient evidence upon which to turn over such personal effects to this representative of relatives?

"(c) In cases where there are no relatives or representatives present at time of death, but where the legal representative desires certain articles shown among the personal effects, what element is to govern in deciding the price at which the personal effects of a deceased soldier are to be sold to the legal representative?

"(d) In cases of the class mentioned in paragraph (c) above, is the amount of the expense of shipping articles to relatives to be deducted from the amount for which the articles are sold to them, or is an additional amount to be obtained from these relatives to cover the expense of transportation?"

2. These questions will be answered in the order stated.

(a) In an opinion of this office dated February 2, 1918 (JAG 220.8) considering the method of disposition of personal effects of a deceased soldier, it was held:

"The person named in the emergency address is not necessarily the legal representative of the deceased soldier. The term 'legal representative' as used in the 112th Article of War (Comp. St. 1916, § 2308a) and paragraph 163, Army Regulations, has been held by this office to mean the duly authorized legal representative of the deceased; that is, an executor or administrator, the former being appointed by the will of a testator and provided with letters testamentary issued by the proper court; and the latter appointed by a probate court either in the absence of a will or, if there be a will, in the absence of an appointment of an executor therein, or in the event of the refusal or failure of the executor so appointed to qualify. This answers both the first and second questions. Third; the disposition of the personal effects of deceased soldiers is governed by the provisions of the 112th Article of War and the regulations made in pursuance thereof. This article only permits the legal representative or widow of the deceased soldier, 'if present,' to take charge of the effects, and provides that if no legal representative or widow be present the commanding officer shall cause the effects to be secured and converted into cash as therein prescribed. The corresponding Article of War under the old code (Article 127) did not require the presence of the legal representative or widow of the soldier for the receipt of the deceased soldier's personal effects, but the new article, in terms, requires such presence, and the plain and unambiguous terms of the statute cannot be varied. It is suggested, however, that in any case where the legal representative or widow cannot be present and they may desire any particular article or articles of the deceased soldier's effects remaining at his post, there is no reason why they may not be permitted by the summary court officer to make such purchase upon such terms as he may consider proper, under that provision of the 112th Article of War which directs that the summary court 'shall have authority to convert such effects into cash, by public or private sale,' etc. In case of such purchase the shipment should be made at the expense of the purchaser."

The form of affidavit referred to in question (a) by which it is sought to establish the appointment of a legal representative is as follows:

District of Columbia, }
Post of Takoma Park. } ss.

Personally appeared before me, the undersigned authority, one ———, who, after being duly sworn, deposes and says:

That he is the duly authorized legal personal representative of (name, rank and organization of deceased) and that he is entitled by law to receive the personal effects of said deceased soldier. _____.

Address: _____.

Relationship to deceased: _____.

Subscribed and sworn to before me this _____ day of _____, 191—.

The appointment of a legal representative is a matter of record in a probate or other court of like jurisdiction and the only proper proof of such appointment is a copy of this record, certified to by the legal custodian thereof or a certificate by such officer properly authenticated that such appointment has been made. No authority for accepting an affidavit in the form proposed exists and it would not be competent evidence of the appointment of a legal representative. Question (a) is, therefore, answered in the negative.

(b) No authority of law exists whereby the affidavit of a person present at a hospital at the time of the death of a soldier may be accepted as proof that such person is authorized to represent the legal representative of such decedent so as to receive the personal effects of the deceased which could properly be delivered to the legal representative if he were present. Such affidavit would not be competent proof either of the appointment of the legal representative nor of the selection of a person to act for him. There is no provision of law whereby such personal effects may be delivered to the agent or representative of a "legal representative." Question (b) is answered in the negative.

(c) This question is answered in the opinion of this office dated February 8, 1918, *supra*, and the Summary Court Officer is authorized to convert the personal effects of the deceased soldier into cash at public or private sale on such terms as he may consider proper. He, therefore, is empowered to fix such value or price as in his judgment is reasonable and proper. Question (c) is answered that the Summary Court is authorized to fix the price at which personal effects of a deceased soldier will be sold at private sale.

(d) The shipment of personal estate of a deceased soldier to his widow or personal representative after purchase of the same, should be at the expense of the purchaser and if the charges of transportation are "prepaid," the amount should be added to and collected with the purchase price, or such personal estate may be shipped "collect" and the cost of transportation paid by the purchaser at the point of destination.

[Signed] James J. Mayes, Acting Judge Advocate General.

48. REFUND OF DISCHARGE PURCHASE MONEY TO DRAFTED MAN

2d Ind.

War Department, J. A. G. O., June 25, 1918.—To the Adjutant General.

1. The Adjutant General by the preceding indorsement refers to this office for opinion the question whether money paid by a soldier for the purchase of his discharge should be returned to him upon being drafted into the military service during the period covered by the enlistment contract from which he has been discharged.

From the papers in reference it appears that Scott M. Campbell, 53rd Company, 14 Prov. Recruit Battalion, 155 Depot Brigade, Camp Lee, Virginia, enlisted in the Regular Army on May 1, 1915, for a period of seven years and in the year 1916, date not shown, purchased his discharge for the sum of \$120, and since his discharge has been drafted into the service under the Selective Service Law. He is of opinion that the money paid by him for his discharge should be returned.

2. Section 4 of the act of Congress, June 16, 1890 (26 Stat. 158 [Comp. St. 1916, § 1893]), relating to discharge by purchase provides:

"That in time of peace the President may, in his discretion and under such rules and upon such conditions as he shall prescribe, permit any enlisted man to purchase his discharge from the Army. The purchase money to be paid under this section shall be paid to a paymaster of the Army and be deposited in the Treasury to the credit of one or more of the current appropriations for the support of the Army, to be indicated by the Secretary of War, and be available for the payment of expenses incurred during the fiscal year in which the discharge is made."

Pursuant to this act of Congress, General Order No. 31, 1914, was issued which in pertinent part provides:

"In time of peace, except as hereinafter provided, any enlisted man who has completed one year's service as such, and is not undergoing punishment or under charges, may obtain the privilege of purchasing his discharge, subject to the approval of the President, the Secretary of War, or a department or mobilized division commander, as prescribed in sections 3 and 4, paragraph I, of this order. * * *

3. The Selective Service Law, May 18, 1917 (40 Stat. 76), provides for the drafting of men between the ages of 21 and 31, inclusive, but makes no exception as to whether or not they have been discharged from former military service by purchase or otherwise. A discharge by purchase can be obtained only in time of peace and is not a guarantee against lawful draft into military service in the event of subsequent Federal need. The discharge of Campbell from his former enlistment, obtained by purchase, served no other purpose and had no other effect than to terminate that enlistment. It does not grant immunity from future military service nor exemption from draft and does not require the amount paid to be refunded in

the event that military service is subsequently required. It is simply an agreement on the part of the government to terminate the enlistment contract then in force and has no effect as to any future emergencies that may arise. Campbell, after securing this discharge, occupies the same position as if he had never enlisted and is subject to such laws and conditions regarding military service as any other man of like age. The discharge is not a contract on the part of the government but the cancellation of a contract and Campbell, by purchasing this discharge, took the risk that his services might legally be required in some subsequent emergency. Under the Selective Service Law, men from all walks of life have been required to forfeit business and professional engagements and employment frequently involving the loss of large amounts of money, and the government, having found necessity for their services, has drafted them into the Army of the United States and is not required to reimburse their losses.

4. I am of the opinion that upon subsequent draft into the military service, there is neither obligation nor authority on the part of the government to refund to a soldier money paid by him for his discharge from a former enlistment although such draft occurs during the period covered by his former enlistment contract.

[Signed] James J. Mayes, Acting Judge Advocate General.

49. FEDERAL STATUS OF NATIONAL GUARD AS TO PAY

Militia XI—Pay and Allowances I C.

19th Ind.

War Department, J. A. G. O., June 29, 1918.—To the Adjutant General.

1. By the preceding indorsement the Adjutant General refers to this office for decision the question involving the status of Private Roy F. Brown, Company B, 4th Infantry, Wisconsin National Guard.

2. By the papers in reference it appears that Private Brown was ordered discharged from the service February 11, 1918, by reason of the loss of his left foot and his right leg on the first of August, 1917. It further appears that Private Brown as a member of the Wisconsin National Guard responded to the President's call and appeared at the company rendezvous July 15, 1917, which was the day the National Guard of Wisconsin was called into the actual service of the United States.

By reason of Private Brown having suffered the injuries in question five days prior to the fifth of August, 1917, the question arises whether Private Brown ever became a member of the military forces and as such entitled to Federal pay and allowances until duly separated from the Federal service as provided by law.

3. It is provided by section 7 of the Act of May 27, 1908 (35 Stat. 401 [Comp. St. 1916, § 3052]), that:

"When the militia is called into the actual service of the United States, or any portion of the militia is called forth under the provi-

sions of this act, their pay shall commence from the date of their appearing at the place of company rendezvous. * * *

It is provided by section 101 of the Act of June 3, 1916 (Comp. St. 1916, § 3050), that:

"The National Guard when called as such into the service of the United States shall, from the time they are required by the terms of the call to respond thereto be subject to the laws and regulations governing the army, so far as such laws and regulations are applicable to enlisted men whose permanent retention in the service, either on the active or retired list is not contemplated by existing law."

It is therefore clear that by the mere act of reporting for duty and appearing July 15, 1917, at the company rendezvous, Private Brown placed himself in the Federal service and became entitled to Federal pay and allowances from that date; and by the plain requirements of section 101, of the Act of June 3, 1916, supra, the National Guard of the State of Wisconsin organized under the National Defense Act occupied a Federal status, as "troops of the United States," from the time it was required by the terms of the call to respond to the service of the United States.

4. By the president's proclamation of July 3, 1917, the members of the Wisconsin National Guard were drafted into the military service of the United States, on and from the fifth day of August, 1917. The proclamation provided that:

"All persons hereby drafted shall on and from the fifth day of August, 1917, stand discharged from the militia, and, under the terms of section 2 of the Act of May 18, 1917 [40 Stat. 76] be subject to the laws and regulations governing the regular army, * * *"

Obviously all persons so drafted on the fifth of August, 1917, stood discharged from the National Guard of the State of Wisconsin, and their relation to such National Guard and such state authority was automatically severed on the fifth of August, 1917, irrespective of whether they were present with their organization or not at that time.

5. It is therefore the opinion of this office that by reporting and appearing for duty July 15, 1917, at the company rendezvous of the Wisconsin National Guard in response to the President's call Private Brown placed himself, by so complying with the terms of such call, in the actual service of the United States, and thereby became entitled to Federal pay and allowances from that date; and that he is entitled to receive such pay and allowances less any forfeitures prescribed by army regulations, until he is duly discharged from the military service.

[Signed] James J. Mayes, Acting Judge Advocate General.

50. ALLOTMENT FOR LIBERTY BONDS, AS AFFECTED BY ABSENCE WITHOUT LEAVE

(A)

2d Ind.

War Department, J. A. G. O., July 2, 1918.—To the Adjutant General.

1. There is referred to this office for opinion the question raised in the following telegram:

"Six one three. The decision of the Judge Advocate General of February twenty-fifth nineteen eighteen states in part: 'Stoppage of pay because of absence without leave is imposed as a penalty and stands upon the same basis as forfeiture decreed by sentence of court-martial.' The Comptroller's decision of April twenty-third states in part: 'The monthly compulsory allotments of pay Class A, the allotments Class B, the Liberty Loan allotments and the premiums of War Risk Insurance are not disturbed or affected by such sentence of courts-martial imposing a forfeiture of pay.' In view of the above it is understood that when a private with Class A fifteen dollars and Class B five dollars allotments and insurance premium of six dollars and fifty cents, is absent without leave for thirty days the stoppage of pay would be three dollars and fifty cents. Information is requested by wire as to whether this is the correct interpretation."

2. As stated in the foregoing telegram, this office held, February 25, 1918, that "stoppage of pay because of absence without leave is imposed as a penalty and stands upon the same basis as forfeitures decreed by sentence of court-martial," being junior to the compulsory allotments under the War Risk Insurance Act of October 6, 1917 (40 Stat. 398). This opinion was based on the language of paragraph 132, Army Regulations, which provides as follows:

"An enlisted man who absents himself from his post or company without authority will forfeit all pay and allowances thereafter accruing until the date of his return to military control, and will be required to make good the time lost by such absence."

The opinion was expressed briefly, without reviewing the precedents on the subject, and, if it be correct, it would follow that such stoppage being in effect a forfeiture, would fall within the reasoning of the Comptroller's Decision of April 23rd as follows:

"The monthly compulsory allotments of pay Class A, under the provisions of sections 200 to 210 of the Act of October 6, 1917 (40 Stat. 402 to 405), the allotments under Class B of said law, the Liberty Loan allotments, and the premiums of War Risk Insurance are not disturbed or affected by such sentences of courts-martial imposing a forfeiture of pay" (24 Comp. Dec. 621, 624).

It is believed, however, that the opinion of this office of February 25, 1918, overlooked the true name of stoppage of pay for absence without leave. Although the word "forfeit" is used in paragraph 132, Army Regulations, in providing for such stoppage, it is the opinion of this office that the stoppage is not a forfeiture of pay imposed as a punishment for the offense, but is in the nature of a civil remedy, a

withholding of pay under the contract, on the ground that the soldier having been withdrawn from service through his own fault did not, in fact, earn any pay and allowances during the period of his unauthorized absence. The regulations for many years have provided that a soldier absent without leave, is not entitled to pay and allowances during the period of his absence, and the rulings on the subject are stated in Digest of Opinions of this Office, Edition 1912, page 16, as follows:

"An enlisted man forfeits his pay and allowances during the period of an absence without leave, as provided in Army Regulations. During such absence he renders no service, and therefore earns neither pay nor allowances. * * * The forfeiture is thus by operation of law, and accrues independently of the result of a trial for the military offense involved in the unauthorized absence. One of the purposes of the muster and pay rolls is to show what service the soldier renders, and if they show that he has rendered none during a particular period by reason of an absence without leave, he is not entitled to pay and allowances during such period. * * *"

This view is in line with the decision of the Supreme Court in *United States v. Landers*, 92 U. S. 77, 23 L. Ed. 603, where the court says:

"Forfeiture of pay and allowances up to the date of desertion follows from the condition of the contract of enlistment, which is for faithful service. The contract is an entirety; and if service for any portion of the time is criminally omitted, the pay and allowances for faithful services are not earned, and for the purposes of determining the rights of the soldier to receive pay and allowances for past services, the fact of desertion need not be established by the findings of a court-martial; it is sufficient to justify a withholding of the moneys that the fact appears upon the muster rolls of his company. * * *"

The decision is also in line with the provisions of the 107th Article of War (Comp. St. 1916, § 2308a), which require time lost during an enlistment, by reason of absence without leave, *inter alia*, to be made good. In other words, time lost by absence without leave is not recognized by the Regulations as service to count on the term of enlistment; and it is not recognized by the Regulations as service for the purpose of earning pay and allowances. The regulation was in force at the time the legislation embodied in the said Article of War was enacted; and it may be assumed that Congress was well aware that pay and allowances do not accrue during a period of soldier's absence without leave. The Assistant Comptroller in a decision rendered December 2, 1905 (12 Comp. Dec. 328), considered at length the subject of forfeiture of pay and allowances on account of desertion and during absence without leave, and concurred in the views of this office, as expressed in opinion cited in his decision, that where a soldier, through his own fault, fails to render service, pay and allowances for faithful services are not earned; that the matter may be determined administratively; and that in making such determination, the Pay Department of the Army is not concluded by the result of a court-martial for trial for the offense involved in the absence. The same principle is the basis of the entire decision of the Comptroller of April 23, to which reference is made in the above quoted telegram. In that decision the Comptroller states specifically:

"No pay accrues in the period of absence without leave, and where no pay accrues there is no pay to forfeit."

3. In the opinion of this office, therefore, a soldier absent without leave earns neither pay nor allowances during the period of such absence, and he cannot be given pay during such period for the purpose of meeting the several classes of allotments described in the ruling of the Comptroller of April 23, 1918, *supra*. It follows that the opinion of this office of February 25, 1918, is erroneous; and that a reply should be made to the telegram to the effect that the stoppage of pay and allowances should include all the pay and allowances which accrue during the period of the absence without leave. It is recommended, however, that the decision of the Comptroller of the Treasury be requested upon the question submitted.

4. In view of the inaptness and misleading character of the word "forfeit," as used in the Regulation, it is recommended that the Regulation be amended so as to read as follows:

"An enlisted man who absents himself from his post or company without authority earns neither pay nor allowance and will be paid none for the period of his absence, from the date of absence until the date of his return to military control, and will be required to make good the time lost by such absence."

[Signed] James J. Mayes, Acting Judge Advocate General.

Affirmed by Comptroller of Treasury, July 13, 1918, Opinion No. A. D. 2359.

(B)

3d Ind.

War Department, J. A. G. O., July 5, 1918.—To the Adjutant General.

1. There are referred to this office for opinion a letter from the Personnel Officer, 4th Training Battalion, 155th Depot Brigade, Camp Lee, Virginia, to the Depot Quartermaster and an indorsement from the Office of the Quartermaster General to the Adjutant General of the Army, concerning the case of Private Leo F. McDowell. It appears that Private McDowell, on October 25, 1917, made an allotment of \$15.00 per month to the Federal Reserve Bank of New York for Liberty Bonds; that he went absent without leave on January 3, 1918, was dropped as a deserter February 4, 1918, was apprehended March 1, 1918, and was convicted of absence without leave; that the allotment was deducted on the October, 1917 pay roll; that no further allotment has been paid; and that pay is due the soldier from November 1, 1917, except for stoppages on account of absence without leave and sentence of general court-martial. Request is made for advice whether the allotment is still in force and what deduction should be made from Private McDowell's pay on account thereof.

2. An allotment for Liberty Bonds may not be voluntarily discontinued by a soldier. Allotments for Liberty Bonds are not affected by sentences of courts-martial imposing a forfeiture of pay. (24 Comp. Dec. 621.) A soldier who is absent without leave is in a no pay status. He earns no pay; and consequently there is nothing during

such period from which an allotment for any purpose may be paid. From the foregoing it follows that Private McDowell's allotment for Liberty Bonds for November and December and for March and the ensuing months should be paid. Assuming that Private McDowell was entitled to pay except for stoppages due to absence without leave and to forfeitures of pay by general court-martial sentence, it is clear that except for the period when he was absent without leave, the amount of his pay allotted to the Federal Reserve Bank of New York for Liberty Bonds accrued to his credit and must be paid to the Federal Reserve Bank of New York. The mere fact that he went absent without leave and was charged with desertion can serve in no way to forfeit this amount. For the period between January 3 and March 1, no pay accrued to Private McDowell and consequently there was during such period no pay to satisfy the allotment. The allotment for this period should be deducted from pay subsequently earned by him. His going absent without leave does not relieve him from the obligation incurred by his subscription for Liberty Bonds.

[Signed] James J. Mayes, Acting Judge Advocate General.

51. ALLOTMENT OF SOLDIERS IN NON-PAY STATUS

4th Ind.

War Department, J. A. G. O., July 12, 1918.—To the Adjutant General.

1. The Commanding General, American Expeditionary Forces, telegraphs June 19, 1918, referring to Comptroller's decision of April 23, 1918 (24 Comp. Dec. 621, 624), to the effect that compulsory allotments of pay Class A under the provisions of sections 200 to 210 of the Act of October 6, 1917 (40 Stat. 402-405), the allotments under Class B of said law, the Liberty Loan allotments, and the premiums on War Risk Insurance are not disturbed or affected by sentences of courts-martial imposing forfeiture of pay, and requests definite advice as follows:

"Decision does not specifically cover "non-pay" status as distinguished from forfeiture of pay, for instance: where soldiers receive no pay as where in hospital due to misconduct under G. O. 45. As it has previously been ruled that non-pay status does not interfere with the payment of compulsory allotment it is assumed that under Comptroller's decision that ruling is extended to cover Class B allotments and insurance premiums. We understand that the terms Class B allotment as used in the Comptroller's decision includes only allotments made to Class B dependents where allowance is applied for and only for amount required to secure such allowance."

2. In the opinion of this office the reasons which give precedence to the allotments referred to over the sentence of the court-martial, imposing a forfeiture of pay, can have no application where the soldier is on a non-pay status. In the situation referred to, that is where the soldier is in hospital as the result of his own misconduct, the law prescribes that he shall receive no pay; and as no pay accrues during such period there is nothing from which said allotments can be paid. In an opinion dated July 5, 1918, with regard to the payment of sev-

eral classes of allotments, during a period a soldier was absent without leave, it was said (J. A. G. 243; A. G. 201):

"An allotment for Liberty Bonds may not be voluntarily discontinued by a soldier. Allotments for Liberty Bonds are not affected by sentences of courts-martial imposing a forfeiture of pay. 24 Comp. Dec. 621. A soldier who is absent without leave is in a no-pay status. He earns no pay; and consequently there is nothing during such period from which an allotment for any purpose may be paid. From the foregoing it follows that Private McDowell's allotment for Liberty Bonds for November and December and for March and the ensuing months should be paid. Assuming that Private McDowell was entitled to pay except for stoppages due to absence without leave and to forfeitures of pay by general court-martial sentence, it is clear that except for the period when he was absent without leave, the amount of his pay allotted to the Federal Reserve Bank of New York for Liberty Bonds accrued to his credit and must be paid to the Federal Reserve Bank of New York. The mere fact that he went absent without leave and was charged with desertion can serve in no way to forfeit this amount. For the period between January 3 and March 1, no pay accrued to Private McDowell and consequently there was during such period no pay to satisfy the allotment. The allotment for this period should be deducted from pay subsequently earned by him. His going absent without leave does not relieve him from the obligation incurred by his subscription for Liberty Bonds."

See, also, opinion of this office, dated July 2, 1918 (A. G. 243), in part, as follows:

"In the opinion of this office, therefore, a soldier absent without leave earns neither pay nor allowances during the period of such absence, and he cannot be given pay during such period for the purpose of meeting the several classes of allotments described in the ruling of the Comptroller of April 23, 1918, *supra*. It follows that the opinion of this office of February 25, 1918, is erroneous; and that a reply should be made to the telegram to the effect that the stoppage of pay and allowances should include all the pay and allowances which accrue during the period of the absence without leave."

For the reasons stated in these opinions, this office is clearly of opinion that while a soldier is in a non-pay status, money cannot be paid to the several classes of allottees. The opinion to the contrary, dated February 25, 1918, has been overruled.

[Signed] James J. Mayes, Acting Judge Advocate General.

52. ENLISTMENT OF MINORS

2d Ind.

War Dept., J. A. G. O., July 15, 1918.—To the Adjutant General.

1. By the preceding indorsement the Adjutant General submits to this office for remark a letter from the Secretary of State to the Secretary of War relating to the status of one Erling Marius Aune who voluntarily enlisted when under the age of 18. It appears that the

enlisted man is now over the age of 18 and that the application for his discharge was not filed previous to his attaining the age of 18. The Secretary of State inquires whether, in such cases, this government will not adopt the same attitude of liberality that characterizes the Canadian government in discharging American boys who have voluntarily enlisted during their minority and without parental consent, in the Canadian military service.

The circumstances under which Erling Marius Aune enlisted in the American military forces do not appear. In fact, no reference whatever is made to the age he gave at the time of his enlistment or what induced him to enlist.

2. The law is well settled that a minor under 18 years of age cannot avoid his enlistment, and where avoidance is sought by the parent or guardian, the rule is that such application must be seasonably made. In the recent case of *Ex parte Dostal* (D. C.) 243 Fed. 664, 670, the court in discussing this principle said:

"The written consent required of the parents or guardian of a minor is primarily for the benefit of such parents or guardian. It is designed, not merely to protect an immature minor from improvident action, but to preserve the parents' or the guardians' right to his custody and service. The parent or guardian may undoubtedly waive the requirement that the consent be in writing. This written consent may undoubtedly be given after, as well as at the time of the enlistment. It follows, as a consequence, that the parent or guardian may, by acquiescence, with knowledge, after the enlistment, waive all right to relief because written consent was not previously given. This waiver will result from silence or acquiescence while a minor is continuing in the service and drawing pay from the Government."

And further, as bearing upon the status of a minor enlisting without the consent of his parents or guardian, the court at page 669, after reviewing the authorities, concluded:

"It is settled law that a minor, who enlists without the written consent of a parent or guardian, when such consent is required, becomes a soldier. His enlistment is not void, nor is it voidable in any event by him. He may be released from the service by a timely application of the parent or guardian having a superior right to his custody or control. But this application must be made with reasonable diligence, after the parent or guardian has acquired knowledge of the actual enlistment, and before an offense has been committed by him."

The authorities clearly recognize that enlistment is a contract, but a contract which changes the status of the person enlisting. By enlisting, the citizen becomes a soldier. His relation to the state and the public are changed. He acquires a new status with correlative rights and duties. Age gives no privilege to an alleged minor who sees fit to enlist in the military forces. This is true because age is not of the substance of the contract of enlistment, and a person who voluntarily enlists, representing himself to be of proper age, cannot destroy the status thus created on the ground that he does not possess the requisite qualifications. To hold otherwise would be to say that the minor is not at liberty to serve his country. It is a fundamental principle of national law, essential to national life, that every citizen, whether of suffi-

cient age to make a contract or not, is under obligation to serve and defend the constituted authorities of the state and nation, and for that purpose to bear arms when such service is required of him. And why may not a minor capable of bearing arms, bind himself by his consent or what is the same thing, contract to do so? Why may not a man of 17 or 18 do this as well as a man of 21? There is certainly nothing alarming in this. Clearly in cases of necessity, the state has the right to enlist whomsoever it pleases. Society could not otherwise be maintained unless every member thereof was obliged to serve and defend the state. These principles are recognized and discussed in the well known cases of *In re Grimley*, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636, and *In re Morrissey*, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644, where the rule is distinctly enunciated; that the age at which an infant shall be competent to perform any military duty depends wholly upon the legislature; that questions of eligibility for such service are solely for the benefit of the government and that age is not of the essence of the contract. If the matter of age were not incidental, then a person enlisting could utter a falsehood to create the military status, and then whenever it suited his purpose, avoid it by pleading the truth.

It is provided in section 27 of the National Defense Act, June 3, 1916 (39 Stat. 186 [Comp. St. 1916, § 1885a]) that minors over the age of 18 can enlist without the written consent of their parents or guardians; and it is also provided in section 57 of the same Act (39 Stat. 197 [Comp. St. 1916, § 3041]).

"That the militia of the United States shall consist of all able-bodied male citizens of the United States and all able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than 18 years of age, and except as hereinafter provided, not more than 45 years of age."

So clearly by the existing law, a minor over the age of 18 can enlist in the militia of which the National Guard is a part, and can enlist in any of the land forces irrespective of the consent of his parents or guardian. The law is well settled, that if the application for a discharge is not made until after the minor has attained the age of 18 years, his enlistment is validated by his service after attaining such age. This rule was recognized and enforced in *Ex parte Hubbard* (C. C.) 182 Fed. 76, and in *Ex parte Dostal* (D. C.) 243 Fed. 664.

The suggestion that this Government should adopt the liberal attitude now characteristic of the Canadian Government and discharge from our Army, at the request of their Governments, those of foreign birth and allegiances who may have enlisted during their minority, presents a question of comity and administrative policy. The President and the Secretary of War are authorized by Army Regulation 13 to order such a discharge. Concededly they would not do so if in their judgment the military service would be weakened or impaired. But as to whether they should adopt such a policy in the instant case or in others of a similar nature is a matter concerning which this office expresses no opinion.

4. It is the opinion of this office that if Erling Marius Aune voluntarily enlisted in the military forces of the United States and has served in such forces since he attained the age of 18 years, that his enlist-

ment cannot be avoided either by himself or his parents and that he cannot now be discharged from the military forces by reason of his having been under the age of 18 at the time he enlisted therein, unless the President or the Secretary of War should deem it expedient to order his discharge.

[Signed] James J. Mayes, Acting Judge Advocate General.

53. EFFICIENCY BOARDS

July 15, 1918.

From: The Office of the Judge Advocate General.

To: The Judge Advocate, Southeastern Department, Charleston, S. C.

Subject: Efficiency boards.

1. In your letter of June 20, 1917 you ask various questions relating to the procedure of efficiency boards in several recent cases submitted to you for your opinion thereon. It is not believed by this office that a consideration of these individual records is called for, neither is it believed desirable to attempt to formulate specific answers to your questions. On the contrary, it is believed that the more helpful course will be to formulate certain general statements with reference to efficiency boards from which answers to your specific questions, and others which may arise, may be deduced.

Efficiency Boards—Authority for.

2. The term "efficiency boards" is generally applied to boards of officers convened under the authority of statutes or regulations for the purpose of passing upon the fitness of officers for commissioned service, and make reports thereon.

Such a board is authorized by section 9 of the Selective Service Act (Act of May 18, 1917, Bulletin 32, War Dept., 1917 [40 Stat. 76]), to examine into and report upon the capacity, qualifications, conduct and efficiency of officers appointed under the 2d, 3d, 4th, 5th, 6th, and 7th paragraphs of section 1 and under section 8 of that Act, and also of temporary officers appointed in the Regular Army under the authority of the 1st paragraph of section 1 of that Act. Boards convened under this authority must be convened by "the general commanding any division or higher tactical organization or territorial department."

For officers of the Reserve Corps the appointment of an efficiency board is authorized by paragraph 41, Special Regulations No. 43, as amended by Changes 4, January 17, 1918. Under these regulations a board may be appointed by the "commanding officer" of the officer to be investigated. It should be noted that in its original form the regulation provided that this board could be convened only by a department commander or the Adjutant General.

For provisional officers in the Regular Army the appointment of an efficiency board is authorized by paragraph 1 of section VII, G. O. No. 76, W. D., 1917. This order may also be cited as authority for convening boards in cases of temporary officers of the Regular Army although the better practice would be to rely upon the statutory au-

thority contained in section 9 of the Selective Service Act (Bulletin 32, W. D., 1917), since a comparison of the regulation with the statute shows that the former is not so broad as the latter in respect to the officers who may convene an efficiency board in this class of cases.

The Convening Order.

3. The order convening an efficiency board must show the authority under which it is convened. It should be in form approximately as follows:

"Under the authority of (section 9, Act of May 18, 1917) (——) a board of officers is hereby appointed to meet at the call of the senior member thereof to examine into and report upon the (capacity, qualification, conduct and efficiency) of (such officers as may be ordered before it) (1st Lieut. ———, N. A.) etc."

The order must, of course, show that it was issued by one having authority to do so.

If such an order as that outlined above is issued to examine into and report upon such officers as may be ordered before it, without designating any particular officer, by one who is not "the general commanding any division or higher tactical organization or territorial department," the order is ultra vires and void. The issuance of such an order would constitute a jurisdictional error and a board convened thereby would be without authority to function as an efficiency board. Its proceedings should properly be declared void and of no effect. Such an illegally constituted board could not lawfully function in a particular case even though the officer referring the same to the board for its consideration would have authority under some other provision of law or regulation to convene a lawful board for that particular case. And the same holding would have to be made if "the general commanding any division or higher tactical organization or territorial department" should order an officer of the Reserve Corps, before a board convened under section 9, Selective Service Act (Bulletin 32, W. D., 1917) to pass generally upon such officers as may be ordered before it. In either case, however, the legality of an executed discharge by the President cannot afterwards be questioned, because of the full and summary power conferred upon him by the statute and hereinafter to be discussed.

If, however, a commanding officer acting within his legal authority convenes an efficiency board to pass upon a particular officer and erroneously cites section 9, Act of May 18, 1917, or some other inapplicable provision of law or regulation as authority for his action, it should be held that, having authority to convene a board in the particular case, an erroneous citation of the authority under which he acts, while it would constitute an irregularity, would not amount to a jurisdictional defect. The report of such a board should not, therefore, be held invalid or void, but may be properly approved and its findings carried into execution. In this case, the order will show upon its face both the fact of jurisdiction to convene the board and the nature of the error committed, which latter may be corrected by proper order or by a notation or certificate by the convening au-

thority at the time he passes upon the proceedings, or subsequently thereto, that the board was in fact convened under proper authority, citing it.

Summary Dismissal by the President.

4. Under section 9 of the Act of May 18, 1917, "the President * * * authorized to discharge any officer from the office held by him under such appointment for any cause which in the judgment of the President would promote the public service." Under section 37 of the National Defense Act (Comp. St. 1916, § 1881a), he may terminate the commission of an officer of the Reserve Corps in his discretion.

Having reference to these provisions of law, it has been suggested that in cases where an indorsement from the Adjutant General's office has erroneously directed an officer of one class to be brought before an efficiency board under the authority of a statute or regulation pertaining to some other class, or in cases where a convening authority has acted beyond his jurisdiction in convening efficiency boards, the boards may be regarded as extra legal but their reports submitted nevertheless to the President as advice upon which he may act in terminating the commission of an officer under the statutory authority just referred to. Beyond question the President, should he so desire, in summarily discharging an officer under section 9 of the Selective Service Act or a Reserve Corps Officer under section 37 of the National Defense Act, may, in the one case, base his action upon any "cause which in his judgment would promote the public service," and, in the other, upon any reason which appeals to or satisfies his discretion. In either case, he may, should he so desire, base his action upon the report of a board which may have acted wholly without authority in passing upon the case of the particular officer in question.

Every officer other than the President whose duty it is to convene efficiency boards or to pass upon their proceedings should, however, exercise every possible care to secure regularity in all that has to do with their organization, investigations and reports. If proceedings are initiated by a commanding general looking to the termination of an officer's commission through the report of an efficiency board, both the organization of the board and its proceedings throughout should be made so regular as to leave no reason or necessity for asking the President to accept a report based upon irregular or void proceedings as advice upon which to terminate an officer's commission through the summary power vested in him. A forceful reason for this suggestion is found in the fact that the statute (section 9, Act of May 18, 1917) confers upon officers who are discharged upon the approved recommendations of an efficiency board, one month's pay and allowances, while for those who are summarily dismissed by the President, no such benefits are provided. This fact suggests that the method of terminating commissions by summary dismissals was intended by Congress to meet the unusual case where a sufficient reason presents itself to the President to induce him to order an officer's discharge without the advice of an efficiency board, rather than to enable the President to in-

terpose his summary power to complete the action in a case in which an efficiency board has been convened without authority or in which it has acted beyond its jurisdiction. As indicated above, however, the legality of the discharge cannot be questioned even in a case of this kind.

If a commanding general should receive from the War Department an order to send an officer before an efficiency board and such order conflicts with the statute or regulation, he should invite the attention of the War Department to this conflict and ask for further instructions or, in case of urgency, should act under the statute or regulation upon the assumption that the order in question had erroneously designated the authority under which a board should be convened in the particular case.

The commanding officer who discovers from the proceedings of a board in a particular case that it has acted therein without jurisdiction, should not hesitate to disapprove such proceedings and to direct that the officer be passed upon by a properly constituted board. If he discovers that the proceedings of the board are merely irregular as hereinbefore pointed out, he should approve such proceedings, should his discretion so determine, and forward the same to the War Department for its action.

Form of Record.

5. Paragraph 1 of section 7, G. O. 76, W. D., 1917, prescribes that the proceedings in the case of an efficiency board convened under the authority of that section should be similar to the proceedings of a retiring board. The exact form of proceedings of efficiency boards convened under any other authority is not prescribed. It is obvious, however, that the procedure should be essentially the same in all cases. In an approved opinion of this office under date of September 14, 1916, relative to procedure of efficiency boards convened under section 77, National Defense Act (Comp. St. 1916, § 3044o), an outline of the procedure which might properly be followed by such boards was given. It is believed that the procedure there outlined might properly be adopted for the purpose of governing all efficiency boards under whatsoever authority convened. In that opinion it was stated that the proceedings of the efficiency board should include:

"(a) The order convening the board;

"(b) The organization of the board, including the place and date and the names of the members present and absent;

"(c) The full name, rank and organization of the officer whose case is before the board for investigation as to his fitness for service, and a statement to the effect that such officer appeared before the board; was permitted to challenge for cause; was permitted to be present during the hearing of all evidence; and was afforded opportunity to be represented by counsel, to question adverse witnesses, to submit evidence, and to make a statement; either in his proper person or by counsel;

"(d) The full name, rank and organization of each witness; a statement that each witness was duly sworn; and a transcript or synopsis of the testimony given by each witness;

- "(e) True copies of all written evidence considered by the board;
- "(f) A transcript or synopsis of any evidence given or statement made by the officer undergoing the investigation, and a copy or synopsis of any argument made by counsel;
- "(g) The findings and recommendation of the board;
- "(h) A minority report by any member who dissents from the finding of the board."

6. The question of the regularity and sufficiency of the record should be passed upon in each individual case in the light of the foregoing general statements.

CWM. [Signed] James J. Mayes, Acting Judge Advocate General.

54. RELATIVE RANK OF TEMPORARY AND PERMANENT COMMISSIONS

2d Ind.

War Dept., J. A. G. O., July 18, 1918.—To the Adjutant General.

1. The accompanying papers present the question whether temporary 1st Lieut. Roland M. Glenn, 22d Infantry, whose commission as such dates from October 26, 1917, will, if he accepts a provisional commission as first lieutenant, dated November 5, 1917, be held to have vacated his temporary commission and be outranked by his present juniors who now hold temporary commissions of even date with his own.

This specific case, informal inquiry at the office of the Adjutant General discloses, is typical of many others; and the decision herein must, therefore, be determinative of the broad question of whether the senior temporary officer in any grade of the Regular Army who accepts a permanent commission in the same grade must become the junior of all officers holding temporary commissions in that grade and in the same arm, staff corps, or department whose temporary commissions antedate his permanent commission but who are his juniors in the Regular Army.

2. The instant case requires a consideration of two previous opinions of this office. In an opinion rendered by this office under date of August 30, 1917 (J. A. G. 64.311) the following was said:

"In my judgment one may not hold two offices in the same military establishment without specific legislative authority therefor. This may be regarded as inferentially established by the fact that Congress has deemed it necessary to protect the commission of an officer in the Regular service when appointed to any other force in the Army of the United States. The incompatibility existing between two officers in the same military establishment is obvious. It is settled that two offices are incompatible when a performance of the duties of the one will prevent or conflict with a performance of the duties of the other, or when the holding of two is contrary to the policy of the law. * * *

"It is my opinion, therefore, except in so far as the statute may give express protection, an officer in one of the component forces of the United States may not hold a position in another such com-

ponent; and that if he be appointed to any such second office, he thereby vacates his former commission."

The opinion just referred to goes to the extent of holding that an officer in one of the component forces of the United States may not hold a commission in another such component. It does not hold, for that point is not involved in the facts of that case, that the same officer may not hold both a permanent and a temporary commission in the same grade at one and the same time although there is language in that opinion which points to this conclusion. The opinion indicates, however, that one may hold two commissions whenever there is legislative authority therefor.

The other opinion to which reference is made is an opinion under date of September 4, 1917 (J. A. G. 82.121) construing that part of section 8 of the Selective Service Act (Act of May 18, 1917 [40 Stat. 81]) considered in connection with section 114 of the National Defense Act governing the subject of promotions to fill temporary vacancies in the Regular Army which occur by reason of the appointment of Regular Army officers to higher grades in the National Army. In the course of that opinion the following was stated:

"It is impossible to foresee and discuss every contingency that may arise in the administration of this law under the construction which I have just indicated will be the proper one to adopt; but it is believed that the difficulties under this plan will be few in comparison with those that would inevitably arise under the alternative construction suggested and that none of those that do arise will prove to be insuperable. It may be proper, however, in addition to what has been stated, to refer to the matter of permanent promotions in the Regular Army. When an officer becomes entitled to a permanent promotion in the Regular Army he must, of course, accept the same. If he is serving as a colonel, let us say, in the National Army and becomes a permanent colonel in the Regular Army, he should ordinarily be continued in service in the National Army. This could involve no impairment of his rank since his commission as a colonel in the National Army would antedate his commission as a permanent colonel in the Regular Army. If, however, an officer is serving as a temporary colonel in the Regular Army, and is promoted to be a permanent colonel therein, it may well be that his commission as a permanent colonel will be subsequent to that held by other temporary colonels who are his juniors in his arm, staff corps, or department. It is my view that the statute intended to protect officers of the Regular Army against a contingency of this kind when it provided that they should not be 'prejudiced in their relative or lineal standing in the Regular Army.' I think it would be a fair construction of this language to hold that Congress intended that no officer of the Regular Army, serving under a commission therein, shall be required to serve with lower rank than that held by a junior in his arm, staff corps, or department and who is also serving under a commission therein. This situation can be obviated by giving the officer who receives the permanent promotion a constructive date of rank as of the date of the temporary commission which he vacates to accept his permanent commission. This may be found necessary to maintain

him in his proper relative or lineal standing in the Regular Army. Cases of this kind will, it is believed, be few in number and can be taken care of by administrative action without difficulty. This construction of the statute and the suggested administrative action thereunder would amply protect officers of the Regular Army in so far as Congress intended to extend protection, and would leave the question of relative rank as between officers serving under commissions in some other army, where Congress, I think, intended to leave—to the fortunes of war and the incidents of service."

The case which was then anticipated has now arisen and the office of the Adjutant General has informally advised this office that the suggestion made in that part of the opinion, quoted just above, to the effect that the senior temporary officer in any grade of the Regular Army who receives a permanent promotion in the same grade be given "a constructive date of rank as of the date of the temporary commission which he vacates to accept his permanent commissions," has proven to be impracticable in actual practice. As pointed out in the opinion last cited, the statute evidently intended to protect officers of the Regular Army against the contingency which the instant case presents when it provided that those who are temporarily promoted under the provisions of section 114 of the National Defense Act (Comp. St. 1916, § 1908a) shall not "be prejudiced in their relative or lineal standing in the Regular Army." It would, therefore, as stated in that opinion, be no more than a fair construction of the language of the statute to "hold that Congress intended that no officer of the Regular Army, serving under a commission therein, shall be required to serve with lower rank than that held by a junior in his arm, staff corps, or department and who is also serving under a commission therein."

This provision of the statute may then be held to supply the legislative authority which, as pointed out in the opinion of this office under date of August 30, 1917 (J. A. G. 64.311) is necessary to authorize an officer to hold two commissions in the same military establishment at one and the same time.

3. It is the opinion of this office, therefore that an officer of the Regular Army who has been temporarily promoted to higher rank therein and who, while holding such temporary rank is permanently promoted to the same grade, may, during the existing emergency, hold his temporary commission for the purpose of fixing his rank in such grade so long as he remains therein. Applying this general conclusion to the facts of the instant case, it is the opinion of this office that Lieut. Glenn may accept his provisional commission as a first lieutenant dated November 5, 1917, and at the same time retain, during the existing emergency, his temporary commission, dated October 26, 1917, for the purpose of fixing his rank in that grade, so long as he remains a first lieutenant.

[Signed] S. T. Ansell, Acting Judge Advocate General.

55. MILEAGE AND TRAVEL ALLOWANCES FOR OFFICERS TESTIFYING BEFORE CIVIL COURTS

3d Ind.

War Department, J. A. G. O., July 23, 1918.—To the Adjutant General.

1. In his communication herewith First Lieutenant Francis G. Trainor, Air Service, Camp Greene, Charlotte, N. C., invites attention to the fact that he complied with a subpoena served upon him at Camp Greene by the sheriff of Mecklenburg County, N. C., from the County District Court of Bell County, Texas, commanding him to appear in that court as a witness "in a certain criminal action" pending in the Texas court, being the prosecution of three enlisted men of the Army, Privates Gerald A. Brice, Clinton B. Hughes, and George A. Bath, charged with murder, and he states that the State of Texas has refused to pay him witness fees or mileage or to reimburse him in any way for expenses incurred under the subpoena. He says he was informed by the state authorities that the laws of Texas make no provision for payment of witness fees, etc., on a subpoena served without the territorial boundaries of the state, and he requests that "the telegraphic instructions of the Adjutant General, dated June 12, 1918, be amended to read that the travel commanded by the subpoena is necessary in the military service," or that such further order be made as will enable him to secure reimbursement of expenses incurred in obeying the subpoena.

2. Lieutenant Trainor explains that he was directed by special orders from headquarters, Aviation Camp, Waco, Texas, May 13, 1918, to proceed to Austin, Texas, or elsewhere within the Southern Department in an effort to apprehend the three soldiers mentioned who were then charged with murder and desertion, and that he and another officer succeeded in arresting the prisoners whom they turned over to the civil authorities for trial "pursuant to verbal order of the Commanding Officer"; and further, that subsequently, about May 25, 1918, he moved with his command from Waco, Texas, to Charlotte, N. C., where he was served with the subpoena, as shown above. Enclosed with the papers is a copy of a telegram from The Adjutant General of the Army dated June 10, 1918, in reply to a telegram from the Commanding Officer, Camp Greene, reading as follows:

"Replying to your telegram of June eighth requesting authority to send Lieutenants Trainor and Rabineau Aviation Section Signal Corps to Belton comma Texas period If trial is being held before civil courts you will authorize these two officers to comply with subpoenas if served on them and in case that the trial is being held before military courts you will order them to proceed to Belton for the purpose mentioned and to return to their proper station upon completion of their duties before the court."

3. The Adjutant General did not order Lieutenant Trainor to obey the subpoena, nor did the telegram direct that he be so ordered. It merely authorized Lieutenants Trainor and Rabineau to comply with the summons. This was in pursuance of paragraph 996½, Army

Regulations. It is expressly provided in paragraph 75, Army Regulations, that officers and enlisted men reporting as witnesses before a civil court should receive from the civil authorities the necessary expenses incurred in travel and attendance and that neither mileage nor travel allowances will be paid in such cases by the War Department. Under the facts stated in the accompanying papers, it is clear that Lieutenant Trainor is not entitled to be paid mileage or to be reimbursed his expenses from federal funds.

[Signed] S. T. Ansell, Acting Judge Advocate General.

551½. REMOVAL OF RESERVE OFFICERS FROM INTERNMENT TO OFFICERS' CAMP

3d Ind.

War Department, J. A. G. O., July 20, 1918.—To the Adjutant General.

1. The question asked by E. Sorensen, Fort Douglas, Utah, a reserve officer in the German navy, interned at the place named, but not on active duty at the time of internment, is whether he is entitled to be removed to a camp for captive officers.

2. It is assumed that this German was interned by applying the Executive Proclamation of April 6, 1917, which was issued under section 4067 of the Revised Statutes. The theory of such internment is simply that the person interned is dangerous. It is not essential that such interned person should be actually or even potentially a member of the hostile forces. Such an internment is a process applied to civilians by civilians and for protection against offenses of a civilian nature. Such an internment does not make a person a prisoner of war in the strict sense. It is not necessary to ask whether such an internment would assume a military aspect if actually applied to a military person; for the person in this case did not have a military character when interned, and internment did not confer upon him a military character. The conclusion is that this German is not entitled to be removed to a camp for captive officers.

[Signed] S. T. Ansell, Acting Judge Advocate General.

56. ALLOTMENTS ON LIBERTY BONDS AS AFFECTED BY DISCHARGE

2d Ind.

War Dept., J. A. G. O., July 26, 1918.—To the Adjutant General.

1. The opinion of this office is desired by the Quartermaster General on the question whether in the case of enlisted men sentenced to be dishonorably discharged and to forfeit all pay and allowances, such sentence of forfeiture includes Liberty Bond allotments, or whether such allotments which have been deducted from the pay of enlisted men "are to be treated as deposits." The Quartermaster General states that refundment and delivery of bonds to men so discharged are being suspended pending a decision of this question.

2. Allotments of soldiers for payment on Liberty Bonds are es-

sentially orders upon the Government to pay to some designated institution or to the Secretary of the Treasury, as the case may be, specified amounts from their pay, which amounts are placed to their credit as payments on the bonds they have subscribed for. Their accounts for this purpose are private, individual accounts, and after such deposits are made by the Government the amount so deposited ceases to be subject to the jurisdiction of the United States as "pay and allowances" of the allotter. If such allotments are paid to a banking institution, clearly the account becomes one between the bank and the person making the allotment, and no sentence of a court-martial could reach funds so deposited to the credit of a soldier. Upon the same principle, similar allotments paid to the Secretary of the Treasury are beyond the reach of a court-martial sentence.

3. The matter of completing payments on Liberty Bonds after a soldier is dishonorably discharged from the service, whether his account be in a banking institution or in the United States Treasury, appears to be one to be adjusted between the soldier and the bank, or the Treasury Department, as the case may be. It is not understood, therefore, upon what authority the Quartermaster General contemplates making refundments in cases where Liberty Bonds have not been entirely paid for. If the bond has been paid for and is ready for delivery to the soldier who has been dishonorably discharged with forfeiture of all pay and allowances, there is no legal reason apparent to this office why such delivery should not be made, provided that the soldier is not indebted to the United States.

[Signed] James J. Mayes, Acting Judge Advocate General.

57. ALIEN NOT ELIGIBLE FOR NATURALIZATION—RIGHT TO DISCHARGE

6th Ind.

War Department, July 27, 1918, J. A. G. O.—To the Adjutant General.

1. Private Isaac S. Kiehn, Evacuation Hospital No. 9, Port of Embarkation, Camp Merritt, New Jersey, a drafted man, complains that he has recently been refused naturalization. He wishes to be discharged or to be relieved from going overseas. He is by birth a Korean, and he appears to have never declared intention to become a citizen of the United States.

2. There is nothing to show that he has at any time made his alienage the basis for a claim of exemption. There is no treaty with his country regarding military service. Neither the Korean Minister nor the Secretary of State has interposed in his behalf.

3. It is provided in the Revised Statutes, section 2169, as amended by the Act of February 18, 1875 (18 Stat. 318 [Comp. St. 1916, § 4358]), that the naturalization laws "shall apply to aliens being white persons, and to aliens of African nationality and persons of African descent." As the person in this case is apparently of Mongolian blood, he is prima facie excluded from naturalization. Yet, the Act of May 9, 1918 (Pub. No. 144), provides, in the 7th subdivision of section 1, that "any alien serving in the military or naval

service * * * during * * * the present war may file his petition for naturalization," and, in section 2, that "nothing in this Act shall replace or in any way enlarge section 2169 of the Revised Statutes except as specified in the 7th sub-division of this Act and under the limitation therein defined." In the seventh sub-division of the Act it is provided that any native-born Filipino who has declared his intention to become a citizen and who has enlisted or may hereafter enlist in the United States Navy or Marine Corps or the Naval Auxiliary Service, and who after service of not less than three years, may be honorably discharged therefrom, may be naturalized. No other persons by race *prima facie* excluded from naturalization are named. It seems that the provisions of that sub-division regarding aliens in general cannot be deemed to overthrow the express language of section 2169 of the Revised Statutes. Hence it seems that Koreans even though in the military service continue to be incapable of naturalization.

4. For the reasons given, Private Keihn cannot be naturalized; but he need be neither discharged nor relieved from duty overseas.
[Signed] James J. Mayes, Acting Judge Advocate General.

58. EXPENSES OF OFFICER ON SPECIAL DUTY

2d Ind.

War Dept., J. A. G. O., July 27, 1918.—To the Adjutant General.

1. The remarks of this office are desired with reference to the request of the Director of Aircraft Production, July 6, 1918, that the decision of the Comptroller of the Treasury be obtained on the question whether actual expenses in excess of five dollars per day may be paid to officers, enlisted men, civilian employees and authorized agents of the Bureau of Aircraft Production, under the following provision of the Act of July 24, 1917 (40 Stat. 243).

"And also for the actual and necessary expenses of officers, enlisted men, and civilian employees of the Army and authorized agents sent on special duty at home and abroad for aviation purposes, including observation and investigation of foreign military operations and organizations, manufacture of aircraft, and engines, also special courses in foreign aviation schools and manufacturing establishments, to be paid upon certificates of the Secretary of War certifying that the expenditures were necessary for military purposes."

He says that the question has arisen as to whether or not it is possible to pay these officers and civilian employees in the Army actual and necessary expenses in excess of the limit of five dollars per day, in view of the provision of the Act of April 6, 1914 (38 Stat. 318 [Comp. St. 1916, § 3236a]), reading as follows:

"On and after July 1, 1914, unless otherwise expressly provided by law, no officer or employee of the United States shall be allowed or paid any sum in excess of expenses actually incurred for subsistence while traveling on duty outside of the District of Columbia and away from his designated post of duty, nor any sum for such expenses actually incurred in excess of \$5.00 per day."

In submitting the question he says that inasmuch as the Act of April 6, 1914, imposes the burden on the officer or employee of paying from his own pocket actual expenses in excess of five dollars per day, it should be strictly construed and not held to apply, where, as in the Act of July 24, 1917, Congress has made provision for "the actual and necessary expenses," without imposing a statutory limit thereto.

2. This office cannot concur in this view. The Act of April 6, 1914, prescribes a maximum as to the expenses which may be incurred and allowed, except as "otherwise expressly provided by law." The Act of July 24, 1917, does not contain an express authority for exceeding the maximum prescribed in the Act of April 6, 1914, and this office is clearly of the opinion that the statutes construed together only authorize the payment of actual and necessary expenses within the limit prescribed by the Act of April 6, 1914. In an opinion of this office, dated June 22, 1918, with reference to the expenses of a proposed mission, composed of officers and civilian experts to investigate the manufacture of airplanes abroad, on the question as to the payment of their actual and necessary expenses under the Signal Corps appropriation Act of July 24, 1917 (40 Stat. 243) it was said in answer to the inquiry as to the limit of actual and necessary expenses which could be allowed that—

"The statute under consideration simply authorizes the payment of the 'actual and necessary expenses' of officers, etc., and by the Act of April 6, 1914 (38 Stat. 318 [Comp. St. 1916, § 3236a]), it is provided that: 'Unless otherwise expressly provided by law no officer or employee of the United States shall be allowed or paid any sum in excess of expense actually incurred for subsistence while traveling on duty outside of the District of Columbia and away from his designated post of duty, nor any sum for such expenses actually incurred in excess of \$5. per day. * * *'"

"By paragraph 733, Army Regulations, the expenses payable to civilians when traveling under competent orders are limited to a maximum of \$4.50 per day. There is no express authority in the Act of July 24, 1917, *supra*, for exceeding the maximum limit prescribed in the Act of April 6, 1914, and it must be held therefore that no payment of actual and necessary expenses can be made in excess of \$5 per day. As to the civilians, as stated above, the regulations further limit the reimbursements of actual expenses to a maximum of \$4.50 per day, and this amount cannot be exceeded without special authority of the Secretary of War. In the opinion of this office, however, it would be competent for the president to supplement the provision made by the Act of July 24, 1917, *supra*, by authorizing reimbursement of actual and necessary expenses of members of this mission in excess of the amount payable under the Act of July 24, 1917, from the Emergency Fund Appropriation, expendable in the discretion of the President."

[Signed] James J. Mayes, Acting Judge Advocate General.

59. EFFECT OF INDUCTION AS TO PAY

9th Ind.

War Dept., J. A. G. O., July 29, 1918.—To the Office of the Provost Marshal General.

1. These papers are referred to this office for an expression of its views as to the status of one Commodore Tilden (colored) who makes a claim for pay and subsistence as a private in the United States Army from April 1, 1918, to July 1, 1918.

2. The facts bearing on his right to the status of a soldier in the Federal Service, and thus entitled to pay and subsistence, as gathered from the papers are as follows: He duly filled out his questionnaire and it was received and filed by his local board (for the city of New Castle, Pa.). This local board in making up a call sent to Tilden a notice, Section 301, Selective Service Regulations (Form 1028). This notice was duly received by Tilden and he presented himself before the board at the day and hour named therein, having waived all claims for exemption. He was told to wait a while; that the Board could not send him to a camp that day and at a later day he was again told to wait. He has waited until the present time to be sent to camp and has not been sent. On July 7, 1918, he presented informally his claim to the Quartermaster General for pay and subsistence from April 1, 1918, the day he appeared in response to the order (Form 1028), *supra*, before the local board, this according to his claim amounting to \$168.30.

The Quartermaster General by 7th indorsement, July 15, 1918, states:

"The question involved in these papers appears to be one for administrative determination, as to whether this soldier is to be considered as having been inducted into the Federal Service as of the date on which he was first directed to report to the Local Board."

3. In the view of this office, on these facts, there is no doubt that he was duly inducted into the Federal Service on April 1, 1918, when in response to the order of his Local Board he appeared before them in all respects ready and fit. This order (Form 1028), *supra*, was regular. He was on time and was properly qualified as far as is shown by the papers. Furthermore Form 1028 contains the following, *inter alia*:

"You are hereby notified that you have now been selected for immediate military service. * * * From and after the day and hour just named you will be a soldier in the military service of the United States."

In the notice which must be enclosed with Form 1028 sent to a selected man in pursuance of section 302, Selective Service Regulations, there occurs the following:

"The day and hour specified on the Classification List of this Local Board, and on the order and notice of induction into military service which accompanies this notice for you to report to this Local Board for military duty, is the time that marks your actual obligation as a soldier of the United States.

"Failure to report promptly at the hour and on the day named is a grave military offense, for which you may be court-martialed. Willful failure to report, with an intent to evade military service, constitutes desertion from the Army of the United States, which in time of war is a capital offense."

4. It appears, 4th indorsement, July 2, 1918, that a mistake was made by the local board in including him among white selectives, although the board admits that—

"It is true that sometime some months ago, in making up of our calls, Commodore Tilden was sent Form 1028."

By way of excuse the board states:

"At the time the mistake was made we thought we would get a call for colored troops in a short time, but we have never had such a call since before the first of January."

All that was done to correct the mistake is set forth as follows:

"The last time Tilden was in, he showed the Chief Clerk his Form 1028, and was told that he would get another form like that when there was a call for him, and the Chief Clerk then threw the old form into the waste paper basket. Tilden remonstrated, and insisted on having it, which he did."

5. This office cannot approve this manner of separating a soldier from the Federal service by throwing his order, that properly inducted him into the service, into the waste paper basket. The method by which a soldier, once inducted into the service, as Tilden undoubtedly was, must be removed therefrom, is contained in Army Regulations, paragraph 139, and 108th Article of War (Comp. St. 1916, § 2308a). In this connection attention is called to Ops. J. A. G. 334.3, June 27, 1918, in which is considered a somewhat similar case, and the following stated:

"In the instant case the registrant having been inducted into the service by the local board, should have been received and accepted by the mustering officer at the mobilization camp and upon the facts of the error in classification becoming known and the ascertainment that the registrant was ineligible and morally unfit for military service, he should have been discharged upon his own application if such was made in conformity to the telegraphic order above quoted, and if no such application was made then his discharge should have been accomplished under authority of Army Regulations 139."

6. As viewed by this office, Commodore Tilden is now and has been since April 1, 1918, a soldier in the Federal Service, and although inducted possibly under a misapprehension as to his color, he will remain in the Federal Service until by some competent authority, in pursuance of the legal methods above indicated, his present legal status is changed and he removed from the service. In the opinion of this office he is entitled to his pay (and subsistence, if allowable) as a private for the period which he claims, and the question should be so determined administratively and a statement of his account made on a payroll or other voucher form, and if he is not sufficiently informed to make a proper voucher, he ought to be given adequate assistance by some officer of the United States.

[Signed] James J. Mayes, Acting Judge Advocate General.

(II) COURTS-MARTIAL AND DISCIPLINARY TREATMENT

1. COURT-MARTIAL JURISDICTION OF PRISONERS OF WAR

Discipline VIII G.

December 27, 1917.

From: Office of the Judge Advocate General.

To: The Department Judge Advocate, Headquarters, Southeastern Department, Charleston, S. C.

Subject: Court-martial jurisdiction of German prisoners of war.

1. An opinion is asked whether German prisoners of war in prison barracks are subject to court-martial jurisdiction for offenses of a civilian nature and whether military tribunals or provost courts may be established for trial of such prisoners.

2. The doctrines of international law on jurisdiction over prisoners of war are embodied in the first sentence of article 8 of the regulations annexed to Hague Convention No. 4, of 1909 (Rules of Land Warfare, 1914 edition, page 158), as follows:

"Prisoners of war shall be subject to the laws, regulations, and orders enforced in the armies of the state in whose power they are;" for, though the Hague regulations are not, in a strict sense, in force at the present time, nevertheless, especially as they were ratified by Austria-Hungary, Germany, and the United States, they are good evidence of what is just and acceptable.

3. The doctrines of the United States are found in the Rules of Land Warfare, paragraphs 51, 68 and 69; and are to the effect that—"If prisoners commit crimes or acts punishable according to the ordinary penal or military laws they are subject to the military jurisdiction of the captor."

4. Special courts-martial do not have jurisdiction over prisoners of war, for, according to Article of War 13 (Comp. St. 1916, § 2308a), such courts-martial have jurisdiction over only the persons enumerated in Article of War 2.

5. According to Article of War 12 the jurisdiction lies in a general court-martial; for prisoners of war are included under persons who by the law of war are "subject to trial by military tribunals," to quote the language of that Article.

6. While the Manual for Courts-Martial remains as it is, it is inadvisable to resort to a provost court or a military commission in such cases. See Manual for Courts-Martial, Par. 3 (a).

7. What has been said is applicable both to military offenses and to offenses of a civilian nature.

[Signed] S. T. Ansell, Acting Judge Advocate General.

2. EFFECT OF ERROR IN COURT-MARTIAL TRIAL

Discipline XIV E 7.

January 22, 1918.

From: Office of the Judge Advocate General.

To: Major Nath B. Barnwell, U. S. R., Department Judge Advocate,
Hdqrs. Southeastern Dept., Charleston, S. C.Subject: Effect of failure of the president of a general court-martial
after a plea of guilty to explain the elements of offenses
and to advise the accused of the maximum punishment.

1. You state that in the case of Private ———, Hdqrs. Company, 109th Infantry, which is now before the reviewing authority, the accused is charged with fraudulent enlistment. That in explaining the nature of the offense charged and the maximum punishment, the president of the court committed an error and did not state the nature of the offense and the maximum punishment correctly. You refer to the memorandum of the Judge Advocate General in the case of Private ——— White (G. C. M. O. 108169) in which it was held that the findings and the sentence of the court were invalid because of the failure of the court to advise the accused of the nature of the offense with which he was charged and the maximum penalty that might be imposed. You ask if failure to observe the provisions of paragraph 154 of the Manual for Courts-Martial “* * * is to be conclusively presumed to injuriously affect the substantial rights of the accused so as to render the proceedings invalid as a matter of law.”

2. After the accused has pleaded guilty the matter of advising him of the nature of the offenses with which he has been charged and the maximum punishment that may be imposed is a matter of procedure. The failure to advise the accused or an error in the advice given will not invalidate the proceedings unless in the opinion of the reviewing authority or confirming authority the error complained of has injuriously affected the substantial rights of the accused. In every case where an error of this nature has occurred, the question of whether or not the substantial rights of the accused have been injuriously affected is for the determination of the reviewing or confirming authority. If the rights of the accused have not been injuriously affected, the record is not invalidated by the error. If they have been injuriously affected, the record is invalidated by the error. 37th Article of War. (Comp. St. 1916, § 2308a); Par. 154, M. C. M.

3. In the White Case (Ibid.) the error complained of had, in the opinion of this office, injuriously affected the substantial rights of the accused. The precedent followed in that case is not applicable to all cases where like error has occurred. Its applicability depends not on whether or not error has occurred but on whether or not the error has injuriously affected the substantial rights of the accused.

[Signed] S. T. Ansell, Acting Judge Advocate General.

3. JURISDICTION OF DIVISIONAL AND DEPARTMENTAL COMMANDERS

Discipline XIV A.

January 25, 1918.

From: Office of the Judge Advocate General.

To: Major Nath. B. Barnwell, U. S. R., Department Judge Advocate.
Southeastern Department, Charleston, S. C.Subject: Proper reviewing authority of the proceedings in the case of
Private ———.

1. You state that the above named private was tried by general court-martial at Shreveport, La., on the 29th day of December, 1917, and found guilty of violation of the 86th Article of War (Comp. St. 1916, § 2308a); that the court before which the accused was tried was convened by the commander of the Southeastern Department. The record of the trial was forwarded to the commander of the Southeastern Department at Charleston, S. C., for review and action under date of January 3, 1918. You state also, that the sentence is in the opinion of the commanding general of the Southeastern Department, both inadequate and inappropriate, and that proceedings in revision should be had by the court with a view of imposing an appropriate and adequate sentence. On January 14, 1917 (it is presumed that you mean January 14, 1918), the organization to which the members of the court and the judge advocate belong left Shreveport for Camp Beauregard. All the members of the court are now at Camp Beauregard and under the command of the division commander at that camp. Under this statement of fact, you ask a series of six questions in regard to the jurisdiction of the commander of the Southeastern Department and the commander of Camp Beauregard, in this case.

2. You do not state whether the accused or his organization has been transferred from the jurisdiction of the Southeastern Department to the commander at Camp Beauregard. If the accused or his organization has not been transferred the commander of Camp Beauregard would have no jurisdiction over his case, regardless of the fact that the members of the court and the judge advocate have been transferred to that jurisdiction.

3. You ask: (1) "Has the Department commander any authority to return the record to the president of the court, and direct the court to reconvene and reconsider its sentence?"

Answer: No. The members of the court having passed out of the jurisdiction of the department commander, that commander is now without authority to reconvene the court.

Question (2): "Has the department commander any right to request the division commander to reconvene the court in order that it may reconsider its sentence?"

Answer: No. He may make any suggestions he desires to the division commander in transmitting the record to him, but the department commander has no authority to order or direct the action of the division commander.

Question (3): "If the foregoing question is answered in the affirmative, has the division commander the right to exercise his own

judgment as to the sufficiency of the sentence and decline to reconvene the court?"

Answer: Yes.

Question (4): "Should the department commander merely transmit the record to the division commander, as the 'officer commanding for the time being,' indicated in A. W. 46, without further explanation?"

Answer: Yes. If the department commander transmits the record to the division commander, the department commander should leave the action to be taken entirely to the judgment of the division commander.

Question (5): "Has the department commander the right to approve the sentence and publish a general court-martial order in this case?"

Answer: Yes. The record as it now stands in this particular case may be reviewed and acted upon by either "the officer appointing the court," or the "officer commanding for the time being." There are a number of cases of about the same status as the one you mention and this office has suggested that in order to avoid confusion, it is generally advisable to forward the record in all such cases to the "officer commanding for the time being," for review and action. In this connection your attention is also directed to paragraph 1, General Orders 96, cs. 1917, which is as follows:

"Paragraph 191, A. R., is amended so as to exempt from the control of the department commander in all that pertains to administration, instruction, training and discipline of all the organized tactical divisions of the National Guard and National Army after they have arrived at their divisional camps."

Question (6): "Has the division commander the right to reconvene the court which was created by an order of the department commander and direct it to reconsider its sentence?"

Answer: If all the members of the court, the judge advocate and the accused are now within the jurisdiction of the division commander, that commander is under the 46th A. W., "the officer commanding for the time being." As such he is vested with all the power, in this particular case, that was possessed by the convening authority, while the accused, the members of the court, and the judge advocate were in the jurisdiction of the convening authority. 1, Winthrop, M. L. & P. p. 689.

[Signed] S. T. Ansell, Acting Judge Advocate General.

4. PROCEDURE UNDER G. O. 7

War Department, Office of the Judge Advocate General.

Washington, February 13, 1918.

From: The Office of the Judge Advocate General.

To: All Department and Division Judge Advocates.

Subject: General Order No. 7, War Department, 1918, its purpose, Procedure thereunder, etc.; suggestions as to office administration.

1. The procedure under General Order No. 7, War Department, 1918, was established to enable the War Department to do substantial justice in those cases in which it is found, on reviewing, in this office, the records of trial by general courts-martial, that persons have been improperly or insufficiently charged with, or convicted on insufficient or illegal evidence of, serious crimes or offenses, and dishonorable discharge or dismissal has already become an accomplished fact. Cases of this character are not numerous, but a case occasionally arises in which remedial action by way of remission of sentence with an offer of restoration to duty or reenlistment is, at best, but a futile attempt to do justice so long as a discharge or dismissal which has been finally executed cannot be reached and set aside or reversed, but must remain standing forever against the record of the accused. Cases where the death sentence is imposed also fall within this class. Great embarrassment would result if it should be held that a death sentence was illegal after the same had been executed.

The necessity for a new procedure growing out of the circumstances indicated, it goes without saying that it was not intended by the publication of General Order No. 7 to magnify or increase the importance of this office or decrease the importance or responsibility of department or division judge advocates.

2. In order to bring about the necessary cooperation in the enforcement of General Order No. 7, War Department, 1918, the following suggestions are made for your information and guidance:

(a) In all records of trial by general court-martial falling within the purview of General Order No. 7, War Department, 1918, to wit: cases involving a sentence of death, dismissal of an officer, or dishonorable discharge of an enlisted man, in which it is not intended to suspend the dishonorable discharge, the department or division judge advocate should prepare a review of the evidence in the case. This should be as brief and concise as possible, but should outline clearly the evidence upon which the conviction must rest. A copy of this review or summary of the evidence should be attached to the record to which it pertains and forwarded for file therewith in this office.

(b) In all cases in which the execution of sentence is deferred until the record of trial is reviewed in this office, judge advocates, prior to forwarding the record of trial, will take the necessary data from the same, draft the general court-martial order, give it the date of action by the reviewing authority, and upon receiving notice from the office of the Judge Advocate General, or any branch thereof, that the record is legally sufficient to support the findings and sentence, cause

the general court-martial order to be published in the usual form. This will make unnecessary the return of the record.

(c) The action of a reviewing authority upon a record of trial which is to be forwarded to this office for review before the execution of sentence should be entered in substantially the following form, the necessary changes being made to conform the action to the facts of each particular case:

(Place and Date.)

In the foregoing case of _____ the sentence is approved (but the period of confinement is reduced to _____). The execution of the sentence will be directed in orders as of this date after the record of trial has been reviewed in the office of the Judge Advocate General, or a branch thereof, and its legality there determined. Jurisdiction is retained to take any additional or corrective action that may be found necessary prior to or at the time of the publication of the general court-martial order in this case.

_____, Commanding.

(d) When the record of trial in any case is found legally insufficient to support the findings and sentence, the record will be returned for the necessary corrective action, which will be entered on the record in substantially the following form, the necessary changes being made to conform the action to the facts of the particular case:

(Place and Date.)

In the foregoing case of _____ under the jurisdiction retained in the action dated _____, the following corrective action is taken:

(Action).

As thus modified the sentence will be duly executed, _____, is designated as the place of confinement (or such final order by way of disposing of the case as the action may require). _____, Commanding.

(e) When the additional or corrective action outlined above has been taken the necessary changes will be made in the general court-martial order prior to the publication of the same. It is needless to say that any prior action which has been changed or nullified by subsequent action will not be included in the general court-martial order as published.

(f) The letter of advice sent from this office will give in each case the court-martial record number given the record upon its receipt in this office. It is desired that the printed copy of the court-martial order be made to carry at the end thereof, in brackets, the number reported by this office, thus: [J. A. G. O. No. ____]. Five copies of the general court-martial order in each case will, when published, be forwarded to this office as promptly as possible.

3. The following suggestions are made with reference to the question of office administration. It is hoped they may be helpful and that their adoption will bring about greater uniformity in the administration of military justice:

(a) Judge advocates should not recommend the reference of charges for trial by general courts-martial until thorough investigation has shown that the charges as laid can be substantiated by sufficient legal evidence.

(b) They should endeavor in every proper manner to limit the number of trials by general courts-martial. No case should be so tried

where the offense committed can be adequately punished by a minor court or by administrative punishments imposed under authority of the 104th Article of War.

(c) They should also aim to prevent the trial of cases whenever it appears on investigation that the offender is lacking in mental responsibility. In all cases where it appears probable that the accused is lacking in physical, mental or moral equipment as an efficient fighting man, the psychiatrist assigned to duty with their commands should be called into consultation. Disposition of the case other than through trial by general court-martial should be made whenever full examination shows this to be proper. Judge advocates should realize, however, that the responsibility for decision in all cases rests upon them and not upon the psychiatrist who may be called into consultation. It should be the latter's duty to advise but not to decide.

(d) As the discipline of the various commands improves it may be possible to reduce trials by general courts-martial to those cases in which it is determined by the methods hereinbefore indicated that the accused who is under general court-martial charges is not a desirable soldier and that his further retention in the service is a waste of time, effort and money.

(e) When a record of trial by general court-martial has been received in the office of a judge advocate, it becomes his duty to thoroughly study the case and to recommend such punishment as should be approved. Where the accused has within him the elements of service, the following principles should govern in deciding upon the punishment to be awarded in time of war:

I. Guard houses are breeding places for crime. They are not designed to foster self-respect. Men should be kept out of them in all cases except where restraint is necessary.

II. Time spent in confinement is time lost from training. Our task is to turn out in the shortest possible time the greatest possible number of trained men.

III. Whenever and wherever possible, men sentenced to undergo confinement or hard labor should be drilled with their organizations and required to serve punishment when other men are resting or off duty.

(f) It is desired that judge advocates make every possible effort to bring offenders who must be tried by general court-martial to trial at the earliest practicable date, to the end that the period between arrest or confinement on the charges and the date of the trial may be reduced to the lowest possible limit.

(g) Judge advocates will also expedite in every possible way the preparation of records of trial, their review of the same and action thereon by the reviewing authority. They will also endeavor to forward records to this office as nearly as possible on the date on which action is taken by the reviewing authority.

[Signed] E. H. Crowder, Judge Advocate General.

5. DURATION OF ARREST OF SOLDIER AWAITING TRIAL

Articles of War LXX, LXXI.

February 25, 1918.

From: The office of the Judge Advocate General.

To: Department Judge Advocate, Headquarters, Southeastern Department, Charleston, S. C.

Subject: Demand of Private John Williams, Company G, 51st Infantry, for release from confinement while awaiting trial for capital offense.

1. The question presented in your communication of February 14th, calls for a construction of the 70th Article of War and arises thus: Private Williams was arrested October 23, 1917, and placed in confinement on the next day, charged with having deserted on the 13th of that month. It is assumed that he has been under arrest and in confinement since his apprehension. It does not appear when, if at all, a copy of the charges were served upon him. Charges were received at the office of the department judge advocate December 11, 1917; that is, more than a month and a half after the soldier was arrested and placed in confinement and these charges were referred out for trial on the same day. It is stated that the case has been set for trial three different times and each time continued by the court under the 20th Article of War (Comp. St. 1916, § 2308a). The trial now seems to be waiting on the recovery of a material witness ill and incapacitated for attendance upon court, because of burns from which he is suffering. On January 28, 1918, the prisoner in writing demanded that he be released from confinement under the provisions of the 70th Article of War. You inquire to what extent this article is to be regarded as mandatory and to what extent discretionary.

2. The 70th Article of War, reads:

"Art. 70. Investigation of and action upon charges.—No person put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled. When any person is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested person be not brought to trial, as herein required, the arrest shall cease. But persons released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest; Provided, That in time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him."

This article in its present form is substantially a reenactment of the old 70th and 71st Articles of War, modified to the extent that its provisions are made applicable alike to officers and enlisted men. The first sentence provides that "no person put in arrest shall be continued

in confinement more than eight days or until such time as a court-martial can be assembled." If this provision stood alone the limitation made here upon the period of confinement would be modified and extended by the clause "until such time as a court-martial can be assembled," which would mean when a court-martial could "practicably or reasonably be assembled; i. e., as soon as the exigencies of the service may permit." Winthrop, vol. 1, p. 165. The succeeding provisions, however, place a clear limitation upon the time during which a person may be held in arrest upon charges pending for trial before a court-martial, except at remote military posts or stations. These require that a copy of the charges shall be served upon the prisoner within eight days after his arrest, and that he be brought to trial within ten days thereafter, "unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days." The phrase "within ten days thereafter" means ten days after the date of the arrest and not ten days after the expiration of the eight days within which charges shall be served. C. 15659.

Discussing the old articles seventy and seventy-one, the provisions of which, as heretofore noted, were reenacted in the present 70th Article and made applicable alike to officers and enlisted men, Mr. Winthrop said:

"The effect of the article (old Article No. 70) as to officers thus is that officers in close arrest may not be retained in such arrest for a longer period than eight days, unless a court-martial cannot with reasonable diligence be assembled within that time. How much longer they may be held, if a court cannot thus convene, is left indefinite.

"But here intervenes Article 71, which provides (among other things) that, 'except at remote military posts and stations' (i. e., those on the frontier or which are distant because of the absence of facilities or communication therewith), officers of the Army shall not be held in arrest for a longer period than forty days. Construing this article with the former, the result is that, as to excepted cases, Article 70 is left to apply without qualification, while as to other cases it cannot be held to authorize, under any circumstances, a confinement before trial longer than forty days." Winthrop, vol. 1, p. 165.

In an opinion under date of February 16, 1905, this office used this language with reference to the old 70th and 71st Articles of War:

"Two Articles of War, the 70th and 71st, are applicable to the cases of an officer in arrest; but the requirements of both are addressed to the period in which an officer may be kept in arrest previous to trial, and both cease to be operative as remedial agencies after the trial has begun. This for the reason that it is impossible to lay down any rules respecting the time that shall be consumed in the trial of the case." C. 16131.

The former opinions of this office give effect to the manifest purpose of the statute and it is now held that when any person subject to military law is arrested a copy of the charges upon which he is to be tried shall be served upon him within eight days after his arrest; that he shall be brought to trial within ten days after his arrest unless the necessities of the service prevent the trial within that time, and that in

any event he shall be brought to trial within thirty days after the expiration of said ten days period or within forty days after his arrest.

3. The question then naturally arises what is the effect of the failure to comply with these statutory requirements. That question is answered in the following language found in Article 70:

"If a copy of the charges be not served, or the arrested person be not brought to trial as herein required, the arrest shall cease. But persons released from arrest under the provisions of this article may be tried whenever the exigencies of the service shall permit within twelve months after such release from arrest."

In an opinion of this office under date of January 21, 1918, in the case of Captain Smedberg, this language was used:

"According to the facts stated in the complaint and the indorsement, Captain Smedberg was arrested on December 12, 1917, a copy of the charges against him were not served as required under the provisions of the 70th Article of War, and his arrest ceased to be operative by law on the 20th day of December."

4. In the instant case, Private Williams was entitled to be released from arrest on the expiration of eight days thereafter if charges were not served upon him, and if charges were served upon him within that time and he was not brought to trial, that is, if the trial was not actually begun within forty days after his arrest, he was entitled, by operation of law, to release from arrest and confinement. He may, of course, be tried at any time within twelve months after his release from arrest whenever the exigencies of the service will permit.

[Signed] E. H. Crowder, Judge Advocate General.

6. INTERIM INVESTIGATION BY COMMANDING OFFICER

Discipline XVI E.

February 28, 1918.

From: The Office of the Judge Advocate General.

To: The Division Judge Advocate, 40th Division, Camp Kearny, Cal.

Subject: Monthly report for January, 1918.

1. In your monthly report you make inquiry as to the necessity of sending to the officer immediately exercising summary court-martial jurisdiction over the command to which the accused belongs, charges which have been directed to be made by the Commanding General. Paragraph 76 of the Courts-Martial Manual requires the officer immediately exercising court-martial jurisdiction over the command to which the accused belongs to investigate or cause to be investigated the charges against the accused. This provision applies only to such charges as would ordinarily pass through the officer so immediately exercising summary court-martial jurisdiction. Where charges are prepared at the direction of superior authority it is not necessary for them to be referred to a subordinate officer for investigation. Consequently, where the Commanding General directs charges to be made concerning offenses of officers and enlisted men, those charges need not be sent to the officer immediately exercising summary court-mar-

tial jurisdiction over the command to which the accused belongs, for his action.

[Signed] R. K. Spiller, Lieutenant-Colonel, Judge Advocate,
Assistant to the Judge Advocate General.

7. G. O. 7—LARCENY PENALTY

March 2, 1918.

From: The Office of the Judge Advocate General.

To: All Department and Division Judge Advocates.

Subject: Action of reviewing authorities under General Order 7,
War Department, 1918; departmental policy dealing with
soldiers convicted of larceny; place of confinement.

1. Paragraph 2 (c) of the circular letter sent from this office under date of February 13, 1918, is corrected to read as follows:

"2 (c) The action of a reviewing authority upon a record of trial which is to be forwarded to this office for review before execution of the sentence should be entered in substantially the following form, the necessary changes being made to conform the action to the facts in each particular case:

(Place and Date.)

"In the foregoing case of — the sentence is approved (but the period of confinement is reduced to —). The — is designated as the place of confinement. The execution of the sentence will be directed in orders as of this date after the record of trial has been reviewed in the office of the Judge Advocate General, or a branch thereof and its legality there determined. Jurisdiction is retained to take any additional or corrective action that may be found necessary prior to or at the time of the publication of the general court-martial order in this case. —, Commanding."

2. The judge advocate of the 37th Division has asked the following questions:

"What policy should be pursued by courts-martial with reference to soldiers found guilty of larceny? Should separation from the service now be a portion of the sentence in such cases?"

The judge advocate of the 31st Division submits the following:

"Under an order from the War Department, prisoners who have not been given long terms and a dishonorable discharge are now sent to the Disciplinary Barracks at Fort Leavenworth.

"The general courts in this division often sentence prisoners to terms of six months or more, and in some instances, give sentences of as much as two years without dishonorable discharge. Where a prisoner is given a sentence of more than six months, what is the policy of the Government as to the place of confinement, and what is your definition of 'a long term of imprisonment'?"

These questions being somewhat related will be considered together. Recent instructions sent out by the War Department contain a sentence reading as follows:

"No sentence of dishonorable discharge will be given where the offender has within him the capacity for military service and where any other proper form of punishment is sufficient to meet the requirements of the case."

As this office interprets the above instruction it is not the policy of the Government to award a sentence of dishonorable discharge in all cases where the soldier has been found guilty of larceny. To announce the policy that a conviction of larceny is to be followed in all cases by expulsion from the service would be equivalent to informing soldiers that they can escape service through committing some trifling theft and pleading guilty thereto when brought to trial by general court-martial. This would tend to defeat the purpose and intent of the Selective Draft Act (40 Stat. 76) and to deplete unnecessarily the man-power of the country. Men who have been brought into the service should be made to serve whenever possible. Capacity for service must be determined in each case on its own facts. Soldiers convicted of petty larcenies, particularly first offenders, should not be dishonorably discharged from the service upon first conviction. They should be given proper punishment and be made to understand that the commission of such offenses will not result, in time of war, in escape from service. They should be held with their organizations and made to serve sentence while undergoing training for war. If, on the other hand, a soldier is convicted of larceny under aggravated circumstances, the facts showing that he is a person of confirmed bad character, and, because of this, not a fit person to be a soldier, he should be discharged from the service and, in addition thereto, be given a long term of confinement.

This office knows of no War Department order which provides "prisoners who have not been given long terms and dishonorable discharge" will be "sent to the Disciplinary Barracks at Fort Leavenworth." On the contrary, War Department instructions contemplate that no soldier will be sent to a disciplinary barracks for confinement unless dishonorable discharge is included within the sentence in his case. Sentences not involving dishonorable discharge will be executed at the station of the soldier's command. It is intended that the enforcement of discipline shall not interrupt training for war any more than absolutely necessary.

No definite rule has been enunciated, for the purpose of guiding reviewing authorities in approving sentences and designating the place of confinement. In the opinion of this office all aggravated cases involving civil crimes, for which penitentiary confinement is authorized under the 42d Article of War (Comp. St. 1916, § 2308a), should be punished by confinement in a penitentiary. Less serious cases, particularly those of first offenders, should be punished by confinement in a disciplinary barracks if dishonorable discharge is approved. Desertion in time of war should be punished by confinement in a penitentiary only in aggravated cases. Those showing no circumstances of aggravation, and particularly those showing circumstances of mitigation, should be punished by confinement in a disciplinary barracks, in order that as many soldiers as possible may be given an opportunity of winning by faithful service in a disciplinary battalion a restoration to duty. It is further the view of this office that in cases of men sent to the disciplinary barracks the dishonorable discharge should be suspended in all except rare and exceptional cases.

This Department and its representatives in the field can best serve

the Government in this emergency by doing everything possible to bring about an administration of military justice which will result in adequately punishing offenders for their wrong-doings but which will hold them to service whenever this can be done with safety to our arms.

[Signed] E. H. Crowder, Judge Advocate General.

8. SUNDRY TOPICS OF COURT-MARTIAL PROCEDURE

March 15, 1918.

From: The Office of the Judge Advocate General.

To: All Department and Division Judge Advocates.

Subject: Various matters relating to the administration of military justice.

1. Some confusion seems to exist among judge advocates as to the scope of General Order No. 7, War Department, January 17, 1918. The closing sentence of paragraph 2 is as follows:

"This rule will not apply to a commanding general in the field except as provided in rule 5."

Many judge advocates seem to assume that commanding officers of divisions in this country are to be considered as commanding generals in the field within the meaning of that term as used in the said order. This is an error. This office does not consider the commanding general of a division in this country a commanding general in the field.

2. The attention of division judge advocates is invited to the fact that the commanding officer at a camp has no authority as such to convene a general court-martial. In cases where a division commander is the commanding officer of a camp where his division is stationed, his orders convening a court-martial should be issued as division orders and not as camp orders.

3. The judge advocate of the 37th Division, referring to the requirement that the convening order and all orders modifying the detail for the court be set out in the record, presents the following:

"It appears to me that great gain can be accomplished by the following suggested procedure. Upon the opening of the court, if more than one case is intended to be tried at that session, to cause each of the accused to appear; the convening and modifying orders could then be read once, and incorporated in the record of the first case tried. Each succeeding record might then recite: 'The order convening the court and modifying orders were read in the presence of the accused at the beginning of the session, as appears of record in the transcript of the case of Private John Doe, ——— Company, ——— Infantry.'"

He suggests that this procedure "would save from one to four pages of record in each case tried during the session except the first; would lessen the time consumed by trials and the expense to the United States thereof."

This office cannot endorse this proposal. In the first place a court-martial, being a court of limited and special jurisdiction, it is required that each record be complete in itself and show all the facts necessary

to establish jurisdiction. The convening and modifying orders are of prime importance in this connection. They must be issued by one having authority to convene general courts-martial and only officers detailed to act as members of the court can officiate in that capacity. It would involve great irregularity and uncertainty in handling court-martial records if the validity of a record in a given case should be made to depend upon what is entered in the records of trial in other cases.

4. The judge advocate of the 38th Division invites attention to the apparent conflict between A. W. 48 and sub-paragraph (b), paragraph II, letter from this office dated February 13, 1918. He states:

"Sub-paragraph (b), referred to above, directs that in all cases in which the execution of the sentence is deferred until the record of trial has been reviewed in this office the court-martial order is to be drafted ready for publication. Under the 48th Article of War a record involving a dismissal of an officer goes to Washington and the court-martial order published there."

It is to be noted, of course, that the circular letter of February 13, 1918, from this office, refers to all cases in which action is completed by the convening authority and the general court-martial order in the case published by him. Obviously it would have no application to cases forwarded under the 48th Article of War (Comp. St. 1916, § 2308a) for the action of higher authority.

5. The judge advocate of the 84th Division presents an inquiry as follows:

"A member of the court sits at a proceeding in revision who was not a member of the court at the original hearing of the case, thereby invalidating the sentence finally imposed by the court in the proceedings in revision. The question is asked whether or not the action of the reviewing authority on the proceedings in revision might not be regarded as an absolute nullity, leaving the reviewing authority free to act upon the original proceedings as though the proceedings in revision had never been taken or return the record to the court for new proceedings in revision, as he might decide."

This office has so held. The reviewing authority, in his corrective action, should refer to the error previously made and should issue a "Corrected Copy" of the original order in the case.

[Signed] E. H. Crowder, Judge Advocate General.

9. OFFICER PREPARING CHARGES—ELIGIBILITY AS MEMBER OF COURT

Articles of War LXXII I.

March 18, 1918.

From: The Office of the Judge Advocate General.

To: The Judge Advocate, Southeastern Department, Charleston, S. C.

Subject: Effect of officer who signs charges sitting as a member of general court-martial.

1. In your communication of March 4, 1918, you state that Private ———, Battery B, 61st Artillery, C. A. C., was arraigned charged with

two offenses under the 96th Article of War (Comp. St. 1916, § 2308a), and upon being arraigned pleaded guilty to both; that the charges were signed by Captain Hardie, who was a member of the court; that when arraigned the accused stated that he had no objection to being tried by any member of the court present; that Captain Hardie thereupon announced that he had signed the charges but had not formed an opinion. He was not challenged by either the prosecution or the defense. No evidence was taken as to whether or not he was eligible, and the court did not make a finding or record of any action upon the question of his eligibility and, in fact, no action was taken thereon. On this state of facts you submit these two questions: (a) Does the record sufficiently establish the fact that Captain Hardie, in preferring and signing the charges, was acting in a purely ministerial manner and was therefore not the accuser in the case? (b) If his eligibility is not sufficiently disclosed, can the reviewing authority return the record for correction by taking testimony on the eligibility of this officer to sit as a member of the court before taking final action on the case?

2. In an opinion under date of February 20, 1914, construing the Act of March 2, 1913, now embraced in the 9th Article, it was said:

"3. Whether or not an officer is the accuser in a particular case is a question of fact. If he is the accuser, he is ineligible to sit as a member of the court for the trial of that case. If, notwithstanding his ineligibility, he does sit as a member of the court, the proceedings are necessarily invalid; for a court composed wholly or partly of officers statutorily ineligible to sit as members thereof is not a lawful court. J. A. G. O. 30-435, Oct. 11 and Nov. 13, 1913; p. 6, Bul. 38, W. D., 1913.

"4. The evident intent of the legislation quoted above is to disqualify for service as a member of the trial court any officer who has placed himself in the attitude of accusing the person to be tried of the offense for which he is to be tried. When an officer upon his own motion prefers and signs a charge there can be no question but that he is the accuser within the meaning of the statute, and is, therefore, disqualified to sit as a member of the court for the trial of such charge.

"5. An officer may, however, not of his own motion but in pursuance of orders from superior authority prefer and sign a charge. In such a case, the action of the officer preferring and signing the charge may be purely ministerial and represent no conviction whatever on his part that an offense has been committed, or that, if an offense has been committed, it was committed by the person charged. In such a case the accuser is not in fact the officer signing the charge, but the officer who directs the preparation and signing of the charge. The former is, therefore, not within the prohibition of the statute, while the latter is.

"6. The officer who has signed the charge in a particular case is, however, *prima facie* the accuser in that case. In signing the charge he has performed an act that, in the absence of a showing to the contrary, must be construed as having been performed in the capacity of an accuser. *Prima facie* he is, therefore, ineligible to sit as a member of the trial court; and the burden of showing that he is in fact eligible must rest upon those who assert such eligibility. It follows that

unless there be a showing to the effect that he is not in fact the accuser in the case he must be regarded as disqualified under the statute from sitting as a member of the court for the trial of the case; and in the absence of such a showing he should be excused from further service as a member of the court when the charge bearing his signature is laid before the court.

"7. If, when the charge is laid before the court, a showing be made to the satisfaction of the court that the preferring of the charge by the officer signing the same was an act purely ministerial in character, performed in pursuance of orders from superior authority and representing no initiative or conviction on the part of the officer so signing, I think the court may find that the officer is not in fact the accuser within the meaning of the statute and therefore is not disqualified under the statute from sitting as a member of the court for the trial of the case. In such a case, however, the fact that evidence touching the eligibility of the officer was heard by the court, and the finding arrived at by the court, should be made of record.

"8. In the absence of the showing, finding and record mentioned in the preceding paragraph, the fact that the officer whose name is signed to the charge sat as a member of the trial court must be regarded as invalidating the proceedings. In general we can look only to the record itself to determine the validity of the proceedings. The record of the case which in the broadest sense must be held to include the original charge, shows that the officer who signed the charge sat as a member of the trial court."

To the same effect is an opinion of this office under date of February 28, 1914, and the earlier opinions of October 11, 1913, and November 13, 1913.

In the opinion of this office, Captain Hardie was ineligible to sit as a member and the proceedings are invalid.

3. Your second question must be answered in the negative. Captain Hardie sat as a member of the Court. Prima facie, he was ineligible to sit and the proceedings are invalid. The question of the eligibility of Captain Hardie should have been tried and disposed of before arraignment and the organization of the Court. On the face of the record, the Court was never lawfully constituted, and it would not be lawful for it now to reconvene to take evidence upon and to investigate the legality of its own existence.

4. The proceedings should be set aside as null and void and the charges referred to another Court for trial.

[Signed] S. T. Ansell, Acting Judge Advocate General.

10. JURISDICTION OF MILITARY POLICE OVER CIVILIANS

Army II F.

March 21, 1918.

From: The Office of the Judge Advocate General.

To: The Judge Advocate, 88th Division, Camp Dodge, Iowa.

Subject: Opinion of March 6, 1918, with reference to cooperation of Military Police with civil authorities.

1. In your memorandum for the Chief of Staff of the 88th Division, you reach the following conclusion:

"(a) It is the opinion of this office, however, that within the limits of the five mile zone, civilians who violate the regulations promulgated by the President and the Secretary of War, may be properly apprehended by the Military Police for violations of sections 12 and 13 of the Act of May 18th, and that having been so apprehended they should at once be turned over to the civil authorities. This office bases its opinion that such arrests and apprehensions may be properly made by the Military Police, upon the provisions of the law which authorize the President and Secretary of War to make regulations prescribing zones which shall be, in a qualified sense, under military control as to alcoholic liquors and prostitution; and the fact that such regulations have been made and promulgated by the President and Secretary of War under the provisions of the law and are now in force. This power, however, does not go to the searching of houses or buildings, nor seizure of property held for unlawful purposes, although it would seem that such power, for the purpose of efficient service, might well have been included."

"(b) Upon the other branch of the inquiry, however, the use of the Military Police outside the five mile zone, this office is unable to find any authority which either expressly or by implication, authorizes the Military Police to make arrests of civilians, or to act either independently or in aid of civil authorities in so far as the activities of civilians are concerned."

2. As to paragraph (a) above quoted, the Judge Advocate General does not concur. So far as the jurisdiction of the military authorities over civilians is concerned, there is no distinction between the proscribed zone and elsewhere. As to paragraph (b), your conclusion is approved, except in so far as you restrict it to territory outside the proscribed zone. The military authorities have no power to order the Military Police or any other part of the Army, as such, to assist the civil authorities in the execution of the law, except when called upon in the manner provided for in the Constitution of the United States and the Acts of Congress. 20 Stat. 152; U. S. Comp. St. 1916, § 1992. Some of the language used in your opinion, while correct as applied to the particular cases before you, is entirely too broad as a statement of general principles. Of course, what is here said does not contemplate the situation where, under the well-known conditions, military power may by proper authority be exercised in aid of the Federal civil power.

[Signed] S. T. Ansell, Acting Judge Advocate General.

11. PENITENTIARY SENTENCE FOR CIVIL OFFENSES

Discipline XVII A 4 h.

March 27, 1918.

From: The Office of the Judge Advocate General.

To: The Judge Advocate, 90th Division, Camp Travis, Texas.

Subject: Construction of the provisions of the 42d Article of War regarding place of confinement upon conviction for civil offenses.

1. In your communication of March 22d, concerning the case of Jim Doddles, Private, Company A, 513th Engineers, you argue to and submit some citations in support of the conclusion—

"That in case an offense has been committed which is not recognizable under the Federal Statutes the law in the state where the offense was committed is applicable."

The old 97th Article of War read:

"No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offense of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory, or District in which such offense may be committed, or by the common law as the same exists in such State, Territory, or District, subject such convict to such punishment."

The 42d Article of War, as contained in the Act of August 29, 1916 (39 Stat. 650-670 [Comp. St. 1916, § 2308a]), so far as material here reads:

"Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall under the sentence of a court-martial be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature by some statute of the United States, or at the common law as the same exists in the District of Columbia," etc.

2. It will be observed that in the Article as adopted in 1916 there is omitted all reference to the statutes or the common law of the various states and territories. Because of this change in the language this office, in construing the 42d Article of War, has held that, to authorize confinement in a penitentiary, the act or omission of which a soldier is convicted must be recognized as an offense of a civil nature by some statute of the United States, that is, some statute enacted by Congress defining the offense and prescribing the punishment therefor, or by common law as the same exists in the District of Columbia, or by way of commutation of a death sentence.

3. Subdivision (c), class 3, paragraph 338, Manual for Courts-Martial, 1917, was evidently based upon the provisions of the old 97th Article of War, and should be disregarded.

[Signed] S. T. Ansell, Acting Judge Advocate General.

12. CHARGE LAID UNDER WRONG A. W.

Discipline II D 4, XIV E 7.

March 30, 1918.

From: The Office of the Judge Advocate General.

To: The Judge Advocate, Port of Embarkation, Hoboken, New Jersey.

Subject: Certain summary court proceedings.

1. In your communication of March 22, 1918, you state that a soldier was tried before a summary court upon two specifications laid under the 61st Article of War (Comp. St. 1916, § 2308a)—one alleging breach of arrest which should have been laid under the 69th Article of War, and one alleging violation of standing orders, which should have been laid under the 96th Article of War. You inquire—

(a) Are the proceedings void, and (b) can the soldier be retried upon charges laid under the 69th and 96th Articles of War?

2. It is assumed from what is contained in your communication that the first specification sufficiently alleged the offense of breach of arrest and that the second specification properly alleged the offense of a violation of standing orders. That is, in each specification all of the elements of the offense were set out and the accused fully advised of the nature of the charge against him. The punishment which may be imposed for an offense constituting a violation of the 61st Article of War is in the discretion of the court. The same is true of an offense charged as a violation of the 69th Article and of an offense charged as a violation of the 96th Article. Neither of these Articles prescribe a mandatory punishment. The character and degree of the punishment to be imposed, whether laid under the one or the other, is in the discretion of the court, and is to be determined from the nature and gravity of the offense as disclosed by the facts alleged in the specification.

A different situation would be presented if a specification charged an offense under some Article which prescribed a mandatory punishment or which authorized the death penalty and it was laid under an Article which authorized such punishment as a court-martial might direct. In such a case it might well be said that the substantial rights of the accused were endangered or prejudiced, for the obvious reason that the Article under which the specification was laid might very well lead him to believe that he was called upon to meet and prepare himself to meet a charge where, upon conviction, the punishment would be within the discretion of the court-martial and less than death, and it might be insisted after the trial that the facts required a mandatory sentence or authorized the imposition of the death penalty.

In the present case no such situation is presented. Furthermore, it does not appear that the accused is seeking to have the proceedings set aside or that he seeks a re-trial upon the same facts upon which he was tried and convicted laid under other Articles.

3. It is the opinion of this office that the proceedings are not void, that the sentence may be lawfully carried into effect and that the ac-

cused may not be lawfully retried upon identical charges upon which he had been tried laid under the 69th and 96th Articles of War.

[Signed] James J. Mayes, Acting Judge Advocate General.

13. CONVICTION BY SUMMARY COURT FOR AN OFFENSE BEYOND ITS JURISDICTION

Discipline XVI.

March 30, 1918.

From: The Office of the Judge Advocate General.

To: The Judge Advocate, Port of Embarkation, Newport News, Virginia.

Subject: Certain summary court proceedings.

1. In your communication of March 22d, you state that a soldier was tried before a summary court for—

(a) Violation of the 61st Article of War [Comp. St. 1916, § 2308a], with an appropriate specification.

(b) Violation of the 63d Article of War, with a specification alleging an offense which should have been laid under the 64th Article of War—willful disobedience of the order of a superior officer.

(c) Violation of the 96th Article of War, with an appropriate specification.

(d) Violation of the 84th Article of War, with an appropriate specification.

You further state that the accused was found guilty of all the charges and specifications and sentenced to be confined at hard labor for two months and to forfeit two-thirds of his pay per month for a like period.

The specification under the 63d Article of War set up a capital offense which the summary court had no jurisdiction to try, and you inquire—

(a) Are the whole proceedings void, and (b) can the soldier be again tried for these same offenses before a proper court upon proper charges?

2. The summary court had authority to try the offenses laid under the 61st, 84th and 96th Articles of War. As to the offenses laid under these charges the court had jurisdiction, hence the proceedings are not void. True, the sentence imposed included punishment for an offense not within the jurisdiction of the court, but the legal effect upon the validity of the judgment would not be different than if the court had found the accused guilty of four charges and specifications and pronounced one sentence thereon by way of punishment, and the reviewing authority had disapproved the findings as to one or more of the charges and specifications, the proper practice in such a case is to make proper mitigation of the sentence imposed.

3. The offense of willful disobedience of the orders of a superior officer, not being within the jurisdiction of the summary court, the proceedings and sentence of the court thereon are void and constitute no bar to a prosecution before a court having jurisdiction.

[Signed] E. H. Crowder, Judge Advocate General.

14. CHARGES UNDER A. W. 96

Discipline II D.

May 21, 1918.

From: 'The Office of the Judge Advocate General.

To: The Assistant Judge Advocate, 37th Division, Camp Sheridan,
Montgomery, Alabama.

Subject: Disposition of offenses involving disobedience of a commissioned officer.

1. In a letter dated May 8, 1918, from the Assistant Judge Advocate, 37th Division, this office is asked for an expression of its views on the policy of trying offenses under the 96th Article of War (Comp. St. 1916, § 2308a) which may be regarded as amounting to violations of the 64th Article of War. He states:

"It has been found that in many cases for violation of the 64th Article of War referred to general courts-martial, the sentence was well within three months and the case could have been handled more expeditiously by a summary court under the 96th Article of War."

The proper disposition of cases of this character requires the exercise of sound discretion and good judgment on the part of judge advocates and commanding officers. Paragraph 74 (e), Manual for Courts-Martial, is in part as follows:

"When a crime or offence is specifically provided for in an Article of War, the charge will be laid under that Article and not under the general order; i. e., under A. W. 96. This rule is particularly to be observed when the crime or offence falls under an article which prescribes a fixed punishment."

This provision of the Manual has direct application to offenses which clearly fall within the language of one of the specific Articles of War. For instance, if a soldier fails to repair at the fixed time to his place of duty, or is absent from the same without proper leave, the charge should be laid under the 61st rather than under the 96th Article of War. If a soldier is absent without leave under circumstances which indicate desertion, he should be tried either under the 58th Article of War for desertion or under the 61st Article of War for absence without leave, as the investigation of the case may determine. In neither event should he be tried under the 96th Article of War. If an officer is found drunk on duty, and there is no question as to his duty status at the time, he should be charged under the 85th Article of War, rather than under the 96th Article of War. There are many cases, however, in which the line of demarkation is not clear and in which it is perfectly proper for the officer preferring the charges or for the convening authority, in the interest of the discipline of his command, to choose between two or more Articles in selecting that one under which the charges should be laid. In practice it is found that such a choice often lies between the 64th and the 96th Articles. When a soldier who has been properly disciplined and instructed, and who understands his military obligations, disobeys a lawful command of his superior officer under circumstances which show a deliberate and intentional defiance of authority, he should be charged under the 64th Article of War. On the other hand, if the soldier has not been properly disciplined and

trained, if he is new to the service and does not yet fully understand its obligations and duties, and if his failure or refusal may be properly attributed more to his ignorance and lack of training or to the lack of experience and judgment on the part of his officers, rather than to a deliberate intent to defy constituted authority, he should be given the benefit of the doubt which naturally arises in his case, and should be so punished as to instill into his mind the requirements of military discipline, but without detracting in too large a measure from that military training and instruction of which he is so much in need. General court-martial records reaching this office indicate that enlisted men are sometimes made to suffer because of inexperience and lack of judgment on the part of officers who are placed over them. An inexperienced officer, through lack of experience in dealing with men, sometimes precipitates a situation in which an enlisted man makes statements which the officer construes as a willful defiance of his authority, and charges are preferred accordingly. When this occurs, a military court is asked to inflict a punishment upon the man which, under better conditions of instruction and training might have been wholly unnecessary. These conditions, appearing at the trial, are beyond doubt responsible for the fact that many cases brought to trial under the 64th Article of War are regarded by the court as nothing more serious than military disorders which should have been charged under the 96th Article of War and tried by a minor court. When such a condition appears upon the investigation of a case, the judge advocate should not hesitate to recommend trial by an inferior court, disciplinary punishment under the 104th Article of War, or such other disposition as will secure the ends of discipline without resorting to measures wholly out of proportion to the circumstances of the offending.

And it may be said in general, in view of the present training, instruction and discipline of our troops, that, whenever a careful investigation shows a particular case to be clearly of the border line type, it becomes the duty of the judge advocate to recommend that disposition of the case which will give the man the benefit of every legitimate doubt which arises in his favor, which will be sufficient to meet the demands of discipline in the particular case, and which will make for a higher quality of training and instruction under which the number of offenses will decrease as the discipline of the command is improved.

[Signed] James J. Mayes, Acting Judge Advocate General.

15. PENITENTIARY SENTENCES, WHEN AUTHORIZED

June 3, 1918.

From: The Office of the Judge Advocate General.

To: The Department Judge Advocate, ——— Department, ———.

Subject: Penitentiary sentences.

1. In view of the remarks in your last monthly report upon the matter of designating a penitentiary as a place of confinement the following comment of this office is brought to your attention.

2. The 42d Article of War (Comp. St. 1916, § 2308a) authorizes confinement in a penitentiary of a person convicted of desertion in time of war, of repeated desertion in time of peace, of mutiny, or of an act or omission recognized as an offense of a civil nature by some statute of the United States, or at the common law as the same exists in the District of Columbia. It also authorizes confinement in a penitentiary by way of commutation of a death sentence.

3. Section 338 of the Manual for Courts-Martial has been amended by striking out therefrom subdivision (c) on page 155. Consequently state statutes adopted by section 289 of the Federal Penal Code can no longer be regarded as furnishing authority for the imposition of penitentiary sentences.

4. An act or omission recognized as an offense of a civil nature by the Code of the District of Columbia is recognized as an offense of a civil nature by a statute of the United States. In other words, the Code of the District of Columbia is considered a "statute of the United States" within the 42d Article of War.

5. If any one of the several offenses of a civil nature of which the accused is convicted is punishable by confinement exceeding one year by a statute of the United States, or by the Code of the District of Columbia, or by the common law as it exists in the District of Columbia, a penitentiary may be designated as the place of confinement.

6. Under A. W. 42, in order to authorize confinement in a penitentiary, whether the offense for which the accused has been convicted be "an offense of a civil nature" or desertion in time of war, repeated desertion in time of peace, or mutiny, the sentence, as approved by the reviewing authority, must impose confinement for one year or more. But as at least one of the Federal penitentiaries under U. S. laws is not authorized to receive military prisoners unless their sentences exceed one year, it has been deemed advisable to fix the rule (Par. 337, M. C. M.) that a court-martial sentence shall not be executed in a penitentiary unless the sentence actually adjudged exceeds one year.

7. The theory of so restricting confinement in a penitentiary as punishment for "an offense of a civil nature" is that the disgrace necessarily attached to a penitentiary sentence may be imposed by a court-martial only in those cases where society considers the act to be of such a character as to merit the degradation of confinement in a penitentiary for more than one year. In order to establish a measure of society's judgment, and to avoid the necessity of attempting to apply the varying laws of the several states, the statutes of the United States and the common law as it exists in the District of Columbia are made the standard. Consequently, as to "an offense of a civil nature," if the act or omission of which the accused has been convicted could, if committed in any place to which the Code of the District of Columbia or other statute of the United States is jurisdictionally applicable, have been punished by confinement in a penitentiary for more than one year, then upon conviction for such act or omission by a court-martial, a penitentiary sentence may be imposed regardless of the place where such act or omission actually occurred. In paragraph 337, M. C. M., it is stated—

"Notwithstanding these departures from the practice of Federal courts, the jurisdiction granted to courts-martial to punish offenses of a civil nature ought not to be exercised with greater harshness than is practiced under the criminal jurisdiction of United States courts, and the analogies with the penal rules of those courts ought carefully to be maintained. The forty-second Article of War and the following rules of practice which result from that article preserve these analogies as far as they can be preserved under court-martial procedure."

This language is intended to state the general policy to be pursued by general courts-martial in respect to the severity of penitentiary sentences, but the sentence of a court-martial that exceeds the punishment imposable by a United States court is not for that reason rendered invalid. The sentence imposable by a United States court for a similar offense may very properly be exceeded by a court-martial in exceptional cases, and confinement executed in a penitentiary.

8. Consequently, the Federal Penal Code should first be consulted. If no pertinent provision is found therein, then the Code of the District of Columbia should be looked to. If neither the Federal Penal Code, nor the Code of the District of Columbia contains any applicable provision, resort must be had to the common law as it exists in the District of Columbia. There will be very few cases in which resort to such common law will be necessary. Where a Judge Advocate can find no applicable statute, he may properly call upon this office for advice with reference to the pertinent rules of the common law as the same exists in the District of Columbia.

9. Under the circumstances above indicated, it is apparent that a copy of the Code of the District of Columbia should be included in the library furnished Department and Division Judge Advocates. The reason that it is not now so furnished is that the Code is out of print. However, the Code is an act of Congress, and is found in the following volumes of the U. S. Statutes at Large, viz.: 31 Stat. 1189; 32 Stat. 520; 33 Stat. 733.

By direction of the Judge Advocate General:

[Signed]

H. M. Morrow,
Lieutenant Colonel, Judge Advocate,
Executive Officer.

16. ESCAPE FROM CONFINEMENT, HOW CHARGEABLE

Discipline II D.

June 13, 1918.

From: The Office of the Judge Advocate General.

To: The Judge Advocate, Southeastern Department, Charleston, S. C.

Subject: Under what Article should charges for escape from confinement be preferred?

1. In your letter of the 8th instant, you request a ruling of this office on the question of whether a specification alleging escape from confinement while serving a sentence imposed by court-martial should be charged under the 69th Article of War or the 96th Article of War (Comp. St. 1916, § 2308a).

You invite attention to the following considerations which suggest the advisability of an opinion from this office in regard to this question:

(a) The apparent confusion which exists in the mind of officers preferring charges for escape from confinement as to whether such charges should be laid under the 69th or the 96th Articles of War.

(b) The fact that the explanatory notes and elements of proof found on page 219 of the Manual for Courts-Martial do not indicate whether or not there is in reality a distinction between escape from arrest or confinement while under charges awaiting trial and a similar escape while undergoing sentence.

(c) The fact that the 69th Article of War, read as a whole, would seem to authorize charges to be preferred under that Article for escape from confinement while undergoing sentence.

(d) The fact that the form for specification given under the 60th Article of War, found on page 340 of the Manual, seems to have been intended to cover escapes committed while in arrest or confinement awaiting trial, only, and that included among the forms given under the 96th Article of War is form No. 137 (page 350 of the Manual), a form for escape from confinement of "a prisoner in confinement serving sentence."

2. The immediate legal antecedents of the present 69th Article of War are found in Articles 65 and 66 of the old code. These Articles, in that code, read as follows:

"65. Officers charged with crime shall be arrested and confined in their barracks, quarters, or tents, and deprived of their swords by the commanding officer. And any officer who leaves his confinement before he is set at liberty by his commanding officer shall be dismissed from the service.

"66. Soldiers charged with crime shall be confined until tried by court-martial, or released by proper authority."

Article 65, referred only to officers "charged with crime." It did not refer in any way to an officer who might be serving a sentence of confinement after trial. Article 66 referred only to the confinement of soldiers "charged with crimes." It did not refer to the punishment of soldiers who are charged with crimes and who might escape from such confinement while awaiting trial. It will thus be seen that under the Articles of War, as they existed prior to the present code, an officer charged with breach of arrest or confinement while awaiting trial was chargeable under the 65th Article of War, but that a breach of confinement committed while undergoing sentence was chargeable only under the 62d Article of War (now the 96th). It will also be seen that a soldier charged with escape from confinement committed while awaiting trial or while undergoing sentence was chargeable only under the 62d (now the 96th) Article of War.

The new 69th Article of War is an enlargement upon the provisions of the 65th and 66th Articles of the old code. It provides for the arrest and confinement of officers; soldiers and any other person subject to military law. The concluding sentences of this Article, which contain its punitive provisions, must be construed as relating only to such persons as are brought within its purview by those provisions which serve to define and limit the scope of its application.

So construed, the Article must be held as applicable only to cases of breach of arrest or confinement while awaiting trial, leaving to be preferred under the General Article, as indeed, has always been the case heretofore, specifications alleging breach of or escape from confinement while undergoing sentence.

[Signed] James J. Mayes, Acting Judge Advocate General.

17. MILITARY PERSONS PURCHASING LIQUOR

June 21, 1918.

From: The Office of the Judge Advocate General.

To: Malcolm L. McBride, Acting Chairman, Commission on Training Camp Activities. 19th & G Streets. N. W., Washington, D. C.

Subject: Prosecutions of commissioned officer and procurers of evidence for violation of liquor laws.

1. By the papers in reference it appears that you wish to ascertain (1) whether trials by courts-martial may be had of all officers shown to be accessories to the violation of liquor laws and regulations, (2) whether such proceedings may be brought against men in the military service who purchase, receive, or accept liquor, for the purpose of obtaining evidence for use in prosecutions. In connection therewith attention is called to the provisions of paragraph IV, G. O. 33, 1918, requiring commanding officers to direct a trial by court-martial of all soldiers shown to be accessories to the violation of liquor laws and regulations.

2. This office, in an opinion dated June 15, 1918, states:

"In the instant case, G. O. 33 creates no offense cognizable by a court-martial. Neither does it purport to do so. It only commands prosecution for acts which are offenses under the Articles of War. Its effect is to point out that persons subject to the Articles of War, who are accessories to the violation of section 12 of the Draft Act (40 Stat. 82) and the regulations made by the President thereunder, are guilty of a violation of the Articles of War and must be prosecuted accordingly. The direction is not new. It is only a repetition, in more positive form, of a former direction. In a circular issued by the Chief of Staff on Nov. 2, 1917, Commanding Officers were advised with reference to section 12 of the Draft Act as follows:

"For violation of the Act by persons not subject to military law, prosecution will be made by United States attorneys in the Federal Courts. For a violation of the Act by persons subject to military law, discipline will be administered by the military authorities either by trial by court-martial under Article of War 96 (Comp. St. 1916, § 2308a), or by other means usual in such cases."

"Without either the direction of November 2nd, or the direction contained in G. O. 33, it is the duty of commanding officers to see to it that those guilty of violations of the Articles of War are properly disciplined. All persons subject to military law who are accessories to a violation of section 12 of the Selective Draft Act of May 18, 1917 (40 Stat. 76, 82), or of the regulations made by the President thereunder are guilty of a violation of the 96th Article of War. It

is therefore the duty of commanding officers to apply disciplinary measures to the offenders, and one disciplinary measure is to subject them to trial by court-martial. The Commanding Officer of the Southern Department, therefore, would be acting within his powers and in accordance with his duties if, without reference to G. O. 33, he directed all officers of his command to subject to trial by court-martial all persons subject to military law who were found to be violators of, or accessories to a violation of, section 12 of the Draft Act or regulations of the President made thereunder."

You are advised that commissioned officers, as well as non-commissioned officers and enlisted men, may be prosecuted in courts-martial proceedings for the violation of the liquor laws and regulations.

3. Answering the second question: The essential element in prosecutions against accessories is the malicious determination to violate the law. This is wanting when liquor is purchased, received, accepted, or had in possession for the purpose indicated in your inquiry. Again, it is inconceivable that when an officer, in the first instance, has asked a soldier to procure the evidence necessary to the conviction of a bootlegger, that such officer will ask for the conviction of the man acting under his order. But the rule of exemption from prosecution applies to those cases only where the officers or men are acting in good faith for the purpose of detecting or investigating crime. It does not apply to cases where the officer or soldier having purchased, received, accepted, or had liquor in possession, with intent to violate the liquor laws or regulations, afterwards attempts to evade responsibility therefor by producing evidence in an effort to convict the bootlegger. I am of the opinion that General Order No. 33 does not direct court-martial proceedings to be instituted against members of the military police, officers or men, who have purchased, received, or accepted liquor from bootleggers, or have had it in their possession within prescribed zones, when such acts are performed for the purpose of obtaining evidence for use in the prosecution of bootleggers in the suppression of illegal liquor traffic.

[Signed] James J. Mayes, Acting Judge Advocate General.

18. SUMMARY COURT—POWER TO REDUCE RANK

7th Ind.

War Department, J. A. G. O., July 11, 1918.—To the Adjutant General.

1. There is referred to this office for decision the question of the legality of the sentence of a summary court in the case of Sergeant Ira Swink, Quartermaster Corps, Fort McPherson, Georgia. It appears that Sergeant Swink was tried by summary court for absence without leave, found guilty, and sentenced "to be reduced to the grade of private first class and to forfeit two-thirds ($\frac{2}{3}$) of his pay per month for a period of one (1) month." The case was referred, for opinion as to the legality of the sentence, to the department judge advocate, Southeastern Department, who said in part:

"* * * The sentence is unquestionably illegal as it stands, but

it is possible that it may be construed in such a way that it need not be set aside as wholly void.

"That portion of the above sentence referring to the change of grade of this man may, it is thought, be regarded as including two elements, viz. a reduction to the grade of private, which is in effect a reduction to the ranks, and appointment to the grade of private first class. Privates first class are under A. R. 278, appointments made from the ranks, and in order to be appointed private first class, an enlisted man must at the time be a private. Under this construction, the sentence involving the reduction of the accused may be regarded as being legal in part and illegal in part. The summary court was authorized to reduce the man to the ranks but had no power to make an appointment to the grade of private first class. * * *

"By adopting the construction suggested above the legal portion of this sentence, viz. the reduction of the man to the ranks, may be given full effect, and the illegal portion, viz. the attempted appointment to the grade of private first class, may be disregarded."

2. This office concurs in the opinion of the department judge advocate in so far as it holds the sentence to involve, in effect, a reduction to the ranks and an appointment to the grade of private first class, and to be, in the terms imposed, beyond the power of a summary court. The number of privates first class, in any organization is limited; their selection is made by the organization commander (A. R. 278). While such selection may technically constitute a mere classification, it is in effect an appointment; and obviously a court-martial has no appointing power. This office does not, however, concur in that portion of the department judge advocate's opinion which holds that the sentence of reduction to private first class can be legally separated into reduction to private and appointment to a higher grade, so that the portion of the sentence reducing Sergeant Swink to private is valid. The portion of the sentence reducing Sergeant Swink in grade is inseparable; the legal and illegal elements of it are so interwoven that the whole must fall. Consequently only so much of the sentence as imposes a forfeiture of pay is valid. The remainder is invalid, and is ineffectual to change the grade of Sergeant Swink.

[Signed] James J. Mayes, Acting Judge Advocate General.

19. ERRORS IN COURT-MARTIAL RECORDS

(A)

July 17, 1918.

From: The Office of the Judge Advocate General.

To: The Judge Advocates [of Divisions, etc.].

Subject: Errors in trials by court-martial.

1. Attached hereto is (a) a compilation of errors committed or permitted to pass without comment in general court-martial records that were received in this office from your command, during the period between June 7, 1918, and July 7, 1918; (b) a list of errors committed or allowed to pass without comment in all of the commands exercising general court-martial jurisdiction for covering the same month. This

data is supplementary to similar data sent out from this office under date of June 24, 1918. If no compilation of errors, (a) above, is included herein, it may be assumed that no errors have been committed or allowed to pass without comment by you during the period covered.

By direction of the Judge Advocate General:

H. M. Morrow, Lieutenant Colonel, Judge Advocate.

Executive Officer.

- * * * * *
- (b) List of Errors Committed or Allowed to Pass Without Comment in All of the Commands Exercising General Court-Martial Jurisdiction for the Month June 7, 1918, to July 7, 1918.

Nature of the Errors.

Accused not instructed as to his rights to testify or make a statement.

Improper instructions as to maximum penalty after plea of guilty.

Record of service not verified by the accused.

Place of confinement.

Improper designation of post.

Improper designation of Disciplinary Barracks.

Improper designation of penitentiary.

No citation of authority for designation of penitentiary as place of confinement.

Improper authority for designation of penitentiary as place of confinement.

Disciplinary barracks designated as place of confinement in a case where penitentiary confinement is authorized, without a statement showing the reason therefor.

Place of confinement not designated.

Improper authentications.

Record not signed by senior member of the court sitting in the trial.

Failure of trial judge advocate to authenticate a record in revision.

Record not authenticated by president of court.

Action of reviewing authority not signed.

Orders convening and modifying the court not authenticated.

Omissions of data in the record as transmitted to the office of the Judge Advocate General.

Top fold of charge sheet missing.

No copies of general court-martial order.

No summary of evidence by the staff judge advocate in cases where such summary is required.

Exhibits missing.

All members of court, judge advocate and reporter not accounted for.

Members of the court or judge advocate improperly excused from sessions of the court.

Improper evidence admitted.

Improperly obtained confession of accused.

Very large mass of hearsay testimony.

Affidavits admitted in capital case.

Evidence of bad character, where character not in issue.

Evidence of previous conviction in case of an officer.

Failure to include in the general court-martial order a reference to all orders creating and modifying the detail for the court.

Omission of the statement that a greater number of officers could not have been detailed to a general court without manifest injury to the service in cases where less than the maximum number was detailed.

Reporter, witness or judge advocate not sworn.

Record did not show affirmatively that accused was accorded full right of challenge.

Offense charged under the wrong Article of War.

Sentences in cases which should have been sent first to the office of the Judge Advocate General under G. O. No. 7, W. D., 1918, completely executed by the reviewing authority without observing G. O. No. 7.

Member of the court sat in a proceeding in revision, though not present at the original trial.
 Variance as to the term of confinement between that recited in the general court-martial order and that recited in the action of the reviewing authority.
 Variance as to the finding on a specification between that recited in the record of trial and that recited in the general court-martial order.
 Convening order omits the heading which shows the authority under which the court was convened.
 Reviewing authority sets forth his approval of the proceedings in an officer's case in an indorsement to The Adjutant General of the Army instead of at the end of the record itself.
 Record does not show affirmatively that accused was given an opportunity to cross-examine witness for the prosecution.
 Incomplete and misleading synopsis of the evidence in the case made up by the staff judge advocate and sent to this office with the record.
 Court refused to permit counsel for the accused to put on his voir dire a member of the court who was challenged.
 Specification fails to state an offense.
 Proceedings in revision interlined in the original record.
 Finding of guilty of a specification charged under a certain Article of War, and not guilty of the Article of War itself.
 Failure of reviewing authority affirmatively and by use of words "approved" or "disapproved" to approve or disapprove a sentence.
 Record fails to show that sentence was imposed by the court.
 Cross-examination of accused after an unsworn statement.
 "Additional Charge" improperly designated as "Charge II."
 Record in case of an officer tried by court appointed by division commander transmitted under the 51st instead of the 48th A. W.
 Name of one of several accused omitted from list of accused.
 Name of accused spelled differently in different places in the record.
 Witness, when recalled to the stand, not cautioned he was still under oath.

(B)

September 28, 1918.

From: The Office of the Judge Advocate General.

To: The Judge Advocates [of Divisions, etc.].

Subject: Errors in trial by general courts-martial.

1. Enclosed herewith is (a) a compilation of important errors committed or permitted to pass without comment in general court-martial records from your command that were reviewed in this office during the period between August 6, 1918, and September 14, 1918; (b) a list of the more common errors found in all of the general court-martial records from all of the commands exercising general court-martial jurisdiction, reviewed in this office during the same period of time. If no compilation of errors (a) above is included herein, it may be assumed that no errors have been committed or allowed to pass without comment by you during the period covered.

By direction of the Judge Advocate General:

Wm. S. Weeks, Lieutenant-Colonel, Judge Advocate,
 Executive Officer.

* * * * *

(b) List of the More Common Errors Committed by Staff Judge Advocates or Allowed by Them to Pass without Comment in All Commands Exercising General Court-Martial Jurisdiction for the Period August 6 to September 14, 1918.

Nature of the Errors.

Accused not properly instructed as to his right to testify or make a statement.
 Improper or incomplete instructions as to the elements of the offense and maximum penalty after a plea of guilty.

Record of service not verified by the accused.

Record of previous convictions not verified by the accused.

Improper authentications.

Record not signed by senior member of the court sitting at the trial.

Failure of trial judge advocate or president of the court to authenticate the record.

Omission of data in the record as transmitted to the office of the Judge Advocate General.

Top fold of charge sheet missing.

No copies or insufficient number of copies of general court-martial order.

No summary of evidence by the staff judge advocate in cases where such summary is required.

All members of the court, judge advocate, assistant judge advocate or reporter not accounted for.

Omission of the statement that a greater number of officers could not have been detailed to a general court-martial without manifest injury to the service in cases where less than the maximum number was detailed.

Specific paragraphs of the M. C. M. setting forth the gist of the offense not referred to.

Record in case of an officer tried by court appointed by division commander transmitted under the 51st instead of the 48th A. W.

Variance in the name of one officer as the same appears on the order detailing the members of the court and as it appears in the list of members present.

Offense charged under the wrong Article of War.

Signature of officer to charge sheet omitted.

Variance in the rank of members of the court without any notation as to the promotions of such members.

20. OFFENSE OF DISOBEDIENCE OF ORDERS

July 17, 1918.

From: The Office of the Judge Advocate General.

To: The Judge Advocate, Central Department, Chicago, Illinois.

Subject: Pleading of disobedience of orders.

1. In your letter of July 10, 1918, you ask the views of this office on the pleading of disobedience of orders and present for consideration a theoretical case which you say is typical of actual cases arising in your department.

You state the case as follows:

"Trial by Summary Court.

"Charge: Violation of the 96th Article of War (Comp. St. 1916, § 2308a).

"Specification: In that Private (name), of (name of command), having received a lawful command from Second Lieutenant (name), his superior officer, to be present at roll call at (time), did, at (place), disobey the same."

And you present the following argument:

"The question arises in my mind as to whether this specification should not be laid under the 64th Article of War. One view is as follows:

"That a charge of disobedience of orders under the 64th Article of War involves a direct disobedience of orders taking place at practically the same time that the order is given. In the specification, a time other than that at which the order is given is indicated. It would therefore appear that the specification is properly placed under the

96th Article of War; that the proceedings of the Summary Court are legal; and that the court had jurisdiction in the case.

"The other view is that the reading of so much of the first paragraph on page 210, Manual for Courts-Martial, as follows: 'Mere refusal to obey such an order before the time set for its execution' does not, it is believed, justify the construction to be put upon those words by the foregoing view. It is believed that the intention meant to be conveyed by the words herein quoted from the Manual is that if a man should be given an order to answer a roll call at a future time and should thereupon state that he would not comply with the order, the particular offense then and there committed would be a violation of the 96th Article of War; but if, when the time has arrived and the roll call was being held, and it was found he had disobeyed the order to be present, he would thereby have committed an offense in violation of the 64th Article of War, unless it were averred that the lawful command of the superior officer had been disobeyed through neglect. It would seem that the averment did disobey without any qualification would mean wilful disobedience in violation of the 64th Article of War."

2. In discussing the disobedience contemplated by the present 64th Article of War, Winthrop (p. 884) remarks:

"It is agreed by the authorities that the offense specified in this part of the Article is a disobedience of a positive and deliberate character. However, it may be exhibited,—whether in the form of an open and express refusal to do what is ordered, or in a simple not doing it, or in a doing of the opposite, or in a doing of something which has been expressly forbidden to be done,—the disobedience must be wilful and intentional."

On this same subject the Manual for Courts-Martial, page 210, contains the following:

"Where the order is operative in futuro a mere neglect to comply with it through heedlessness, remissness, or forgetfulness is an offense chargeable not in general under this article, but under the general article (Winthrop, p. 884), and the same is true of a mere refusal to obey such an order before the time set for its execution. * * * Disobedience of an order which has for its sole object the attainment of some private end or which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit is not punishable under this article."

3. This office does not accept either of the views outlined by you as wholly correct. In the first place, it is certainly not correct to contend that if an order is to be executed in futuro disobedience thereof should be charged as a violation of the 96th Article of War. Neither is it correct to say that in the absence of an averment that the disobedience was through neglect, mere disobedience of the order at the time it was intended to be executed is sufficient to bring the offense within the 64th Article of War. In order to constitute a violation of the latter article, the disobedience must be wilful and intentional. Regardless of when the order was intended to be obeyed, if the disobedience was not in fact wilful and intentional, it does not amount to a violation of the 64th Article of War. On the other hand, if the element of wilful in-

tent is actually present the mere fact that the order was not to be obeyed at the time it was given, cannot suffice to take the case out of the 64th Article and place it under the 96th.

But as this office views the instant case the time when the disobedience occurred with reference to the time that the order was given, or the existence or nonexistence of the element of wilful intent cannot be taken as alone determinative of the Article under which the charge should be laid. The controlling provision of regulation on the question is found on page 210 of the Manual for Courts-Martial, and reads as follows:

"* * * Disobedience of an order * * * which is given for the sole purpose of increasing the penalty for an offense which it is expected the accused may commit is not punishable under this article."

In the case presented, the soldier is charged with having disobeyed an order in futuro "to be present at roll call." If this was a regular call of his organization, it would be his duty to be present thereat, unless excused by proper authority. If the call in question was not a regular call, but one of which the soldier was given due notice, it would likewise be his duty to attend, unless excused by proper authority. In either case he can be tried and punished for failure to attend, if the failure occurred under aggravated circumstances these may properly be alleged for the purpose of increasing the punishment and the reason for giving a specific order to attend would not be clear, unless given for the purpose of increasing the penalty which the absence itself might involve. Under this aspect of the case presented the charge should not be laid as a violation of the 64th Article of War, for as indicated by the Manual, a simple offense, such as absence from a prescribed roll call, cannot properly be converted into a capital offense under the 64th Article of War by the mere addition of a specific order to attend the same. The giving of a specific order with a view of bringing the case within the 64th Article of War is impliedly prohibited under the circumstances in question and, regardless of whether the disobedience was wilful and intentional, the offense should be laid under the 96th Article of War, the aggravating circumstances being properly alleged if desirable.

If the order was not given under circumstances which would bring it within the provision of the Manual with reference to giving of orders for the purpose of increasing the penalty for an offense which it is expected the accused may commit, then, of course, the test to be applied in determining whether the offense should be charged under the 64th Article of War, must be found in the existence or nonexistence of the element of wilful intent, unless it should fall within that other provision of the Manual which provides that "mere refusal to obey such an order before the time set for its execution," does not present a case, under the 64th Article of War. If an order is given to be executed at a fixed time in futuro, an earlier refusal to obey such an order does not constitute the capital offense contemplated by the 64th Article of War.

CWM [Signed] S. T. Ansell, Acting Judge Advocate General.

21. AUTHORITY TO APPOINT GENERAL COURTS-MARTIAL

2d Ind.

War Department, J. A. G. O., July 17, 1918.—To the Adjutant General.

1. The Adjutant General by the preceding indorsement refers to this office for remark and recommendation a telegram dated July 12, 1918, from Brig. Gen. Guy H. Preston, Camp Custer, Michigan, as follows:

"Request information if one hundred and sixtieth depot brigade is a separate brigade whose commanding officer may appoint a general court-martial within the meaning of the eighth Article of War. Commanding officer of one hundred and sixtieth depot brigade is not at present camp commander."

2. The 8th Article of War (Comp. St. 1916, § 2308a) provides:

"The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an army, an army corps, a division, or a separate brigade, and, when empowered by the President, the commanding officer of any district or of any force or body of troops, may appoint general courts-martial. * * *"

Army Regulation 191, as amended by G. A. R. No. 49, W. D., 1916, and No. 57, W. D., 1917, in pertinent part provides:

"The commander of a territorial department commands all the military forces of the government within its limits, whether of the line or staff, except in so far as exempted from his control by the Secretary of War. The Army War College * * * and any other military forces temporarily within the department when such force is commanded by an officer exercising general court-martial jurisdiction are exempted from the control of department commanders, except the supervisory control, as prescribed in paragraphs 193-749, and 1004 over the issue of supplies, except medical, for general hospitals."

This regulation was further amended by General Order No. 19, W. D., dated February 19, 1918, paragraph IV as follows:

"Paragraph 191, Army Regulations, is amended so as to exempt from the control of department commanders, in all that pertains to administration, supply, instruction, training, and discipline, not only all of the organized tactical divisions of the National Guard and National Army, and troops attached thereto, after they have arrived at the divisional camps (General Orders, No. 137, War Department, October 30, 1917), but is also amended so as to exempt from the control of department commanders in the matters mentioned all Regular Army divisions after they have arrived at divisional camps, and also divisional camps and cantonments of the National Guard, the National Army, and the Regular Army.

"In case division commanders and their headquarters are moved from such camps or cantonments leaving there other troops, camp and cantonment commanders are, by direction of the President, empowered as above in regard to administration, supply, instruction,

training, and discipline, with the power of appointing general courts-martial whenever necessary."

3. Under this amendment when division commanders and their headquarters are removed from camps or cantonments, leaving there other troops, camp commanders are clothed with general court-martial jurisdiction.

General Order No. 56, W. D., June 13, 1918, in paragraph III provides:

"By direction of the President the commanding officer of each of the following camps is empowered, under the 8th Article of War, to appoint general courts-martial whenever necessary: * * * Camp Custer, Battle Creek, Mich. * * *

"The jurisdiction of commanding officers of camps under authority of this order shall be limited to persons subject to military law who are serving at camps commanded by them and who do not belong to tactical divisions serving thereat, except that the commanding general of a tactical division may, in his discretion, direct members of his division against whom charges have been preferred to report or be turned over to the commanding officer of the camp at which his division is serving for trial by general court-martial, transmitting to the commanding officer of the camp the charges and all papers in the case. Members of a division so ordered to report or to be turned over to the commanding officer of a camp for trial shall be considered detached from the division until the charges pending against them have been disposed of, and the commanding officer of the camp shall have jurisdiction to bring them to trial."

The specific question involved in this inquiry is whether a depot brigade at such camp or cantonment can be considered a separate brigade as contemplated by the 8th Article of War so as to invest the brigade commander thereof who is not the camp commander with general court-martial jurisdiction. The answer to the question turns on the definition of the word "separate." If a depot brigade at a camp or cantonment where other brigades or troops are stationed may be properly termed a "separate brigade," then such brigade commander has general court-martial jurisdiction, otherwise such jurisdiction does not exist. The word "separate" as here used is defined as "unconnected; disjointed." It could scarcely be contended that such a brigade stationed at a camp or cantonment with other brigades and troops could properly be called an unconnected, disjointed or unattached brigade because it is connected with and attached to other troops and as to administration, supply, instruction, training and discipline is by the amendment in General Order No. 19, and 56, W. D., current series, under the control of the camp commander like other troops in the same camp or cantonment. Therefore such brigade is not a separate brigade.

4. It is the view of this office that a depot brigade at a camp or cantonment where other troops are stationed is not a separate brigade as contemplated by the 8th Article of War and that such brigade commander, unless he is also the camp commander, does not have authority to appoint a general court-martial.

[Signed] S. T. Ansell, Acting Judge Advocate General.

22. PUNISHMENT OF PRISONER OF WAR ATTEMPTING ESCAPE

1st Ind.

War Department, J. A. G. O., July 19, 1918.—To the Department Judge Advocate, Southeastern Department, Charleston, S. C.

1. An officer in the German Navy, being a prisoner of war at Fort McPherson, Georgia, attempted to escape from confinement by aiding in constructing a tunnel. He has been tried by general court-martial and has pleaded guilty. The sentence of the court was confinement at hard labor for ten years. The commanding general of the department has asked whether it would be legal to modify that sentence in such a way as to impose confinement at hard labor for the period of the war, not exceeding ten years, and whether it would be proper to return the record of trial with a view to including in the sentence forfeiture of pay and allowances.

2. Sentences for the duration of the war should not be imposed. Sentences should bear relation to the seriousness of the offense; and an offense does not become more or less serious by reason of the length of the war, especially as the termination of the war cannot be affected by the offender. It is possible that when the war ends many offenders will be released; but this is a question to be decided in the future by the persons then charged with determining the policy of the Government. Prisoners of war, especially, will be dealt with at the end of the war under international agreements dependent to some extent upon the treatment received by our own troops.

3. The really serious problem is to determine to what extent international law and the law of the United States make it proper for a court-martial to punish a prisoner of war for attempting to escape. The question is easily divisible into three parts: (a) The jurisdiction of military tribunals over prisoners of war; (b) the criminality of an escape or of an attempt to escape; and (c) the punishment.

4. As to the mere existence of the jurisdiction of a general court-martial over a prisoner of war, it will be found that the solution rests eventually upon general international law. Prisoners of war are not enumerated in the 2d Article of War among the persons subject to military law; but the 12th Article says:

"General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles and any other person who by the law of war is subject to trial by military tribunals."

5. It now becomes important to determine what jurisdiction is conferred by the 12th Article of War because of its naming the law of war. The pertinent Hague Conventions are not in force at the present time, as by their terms they are not in force unless all the parties to the war are parties to the conventions. There are pending negotiations with Germany regarding prisoners of war; but it is impracticable to hold back this opinion longer for the sake of relying upon the agreement to be made. It is necessary, then, to assume that the Hague conventions, even though not in force, represent approved action, and that action in accordance with them cannot give rise to complaint except

in the rare instances where a provision in the Hague Conventions can be shown to be wholly novel or to be an adoption of one of several competing views; and it is also necessary to assume that when Hague Conventions fail to solve the problem an appeal may fairly be made to the official declarations of the countries in interest, and also to writers on international law, especially those who wrote before the outbreak of the European war.

6. As has been stated, there are really three parts to the problem regarding the punishment of prisoners of war for trying to escape. It will be found that these three parts are not always separated in the passages dealing with the general subject. Hence, in examining the passages which will be quoted it is necessary to bear in mind each of the three phases of the problem: (a) The jurisdiction of military tribunals over prisoners of war; (b) the criminality of an escape or of an attempt to escape; and (c) the punishment.

7. The Hague Conventions are necessarily cited both for and against any action to be taken, even though it be admitted that the conventions are not strictly in force. The Hague Conventions of 1899 and 1907 respecting the Laws and Customs of War on Land said (2 Malloy's Treaties, p. 2277):

"The Contracting Powers shall issue instructions to their armed forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention."

The Regulations annexed said (2 Malloy's Treaties, pp. 2282, 2283):

"Article VIII. Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary.

"Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment.

"Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight."

Though these conventions are not strictly in force, it is noticeable that they were ratified by both Germany and the United States and that the ratification did not exclude these passages.

8. The Rules of Land Warfare, issued by our Government in 1914, being "approved and herewith published for the information and government of the land forces of the United States," must be used both by the Germans and by us as limiting the powers of courts-martial regarding this matter.

The following passages are pertinent:

Paragraph 51 says:

"If prisoners commit crimes or acts punishable according to the ordinary penal or military laws, they are subjected to the military jurisdiction of the state of the captor."

Paragraph 60 says:

"Prisoners of war must not be regarded as criminals or convicts. They are guarded as a measure of security and not of punishment."

Paragraph 61 says:

"The object of interment is solely to prevent prisoners from further participation in the war. Anything, therefore, may be done that is necessary to secure this end, but nothing more."

Paragraph 67 quotes from Article VIII of the Hague Regulations, as follows:

"Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the state in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary."

Paragraph 68 says:

"Prisoners of war may be fired upon and may be shot down while attempting to escape, or if they resist their guard, or attempt to assist their own army in any way. They may be executed by sentence of a proper court for any offense punishable with death under the laws of the captor, after due trial and conviction."

Paragraph 69 says:

"For all crimes and misdemeanors, including conspiracy, mutiny, revolt, or insubordination, prisoners of war are subject to trial and punishment in the same way as soldiers of the army which captured them."

Paragraph 70 says:

"If a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punished, even with death; and capital punishment may also be inflicted upon prisoners of war who are found to have plotted rebellion against the authority of the captors, whether in union with fellow prisoners or other persons."

Paragraph 78 quotes from Article VIII of the Hague Regulations, as follows:

"Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment."

Paragraph 79 says:

"The words 'disciplinary punishment' are intended to exclude a sentence of death. The usual punishment for attempts to escape consist in curtailment of privileges or closer confinement or detention."

Paragraph 80 quotes from Article VIII of the Hague Regulations, as follows:

"Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight."

9. In defending any action taken by the American Government, it is useful to know what is the accepted German doctrine. The German official publication entitled "Kriegsbrauch im Landkriege," as translated in Morgan's German War Book (pp. 70-74), says:

"Prisoners of war are subject to the laws of the state which has captured them. * * *

"The prisoners of war have, in the places in which they are quartered, to submit to such restrictions of their liberty as are necessary

for their safe keeping. They have strictly to comply with the obligation imposed upon them, not to move beyond a certain indicated boundary.

"These measures for their safe keeping are not to be exceeded; in particular, penal confinement, fetters, and unnecessary restrictions of freedom are only to be resorted to if particular reasons exist to justify or necessitate them.

"The concentration camps in which prisoners of war are quartered must be as healthy, clean, and decent as possible; they should not be prisons or convict establishments. * * *

"Freedom of movement within these concentration camps or within the whole locality may be permitted if there are no special reasons against it. But obviously prisoners of war are subject to the existing, or to the appointed rules of the establishment or garrison. * * *

"Insurrection, insubordination, misuse of the freedom granted, will of course justify severer confinement in each case, also punishment, and so will crimes and misdemeanors.

"Attempts at escape on the part of individuals who have not pledged their word of honor might be regarded as the expression of a natural impulse for liberty, and not as a crime. They are therefore to be punished by restriction of the privileges granted and a sharper supervision but not with death. But the latter punishment will follow of course in the case of plots to escape if only because of the danger of them. In case of a breach of a man's parole the punishment of death may reasonably be incurred. In some circumstances, if necessity and the behaviour of the prisoners compel it, one is justified in taking measures the effect of which is to involve the innocent with the guilty. * * *

"These rules may be shortly summarized as follows:

"Prisoners of war are subject to the laws of the country in which they find themselves, particularly the rules in force in the army of the local state; they are to be treated like one's own soldiers, neither worse nor better.

"The following considerations hold good as regard the imposition of a death penalty in the case of prisoners; they can be put to death:

"1. In case they commit offenses or are guilty of practices which are punishable by death by civil or military laws.

"2. In case of insubordination, attempts at escape, etc., deadly weapons may be employed.

"3. In case of overwhelming necessity, as reprisals, either against similar measures, or against other irregularities on the part of the management of the enemy's army.

"4. In case of overwhelming necessity, when other means of precaution do not exist and the existence of the prisoners becomes a danger to one's own existence."

10. A recent British book, published, however, before the war, viz. Spaight on War Rights on Land (1911), says (pp. 285-288):

"Prisoners of war are subject to the laws and regulations of the capturing army. The French prisoners of 1870-71 were placed under precisely the same regulations as the soldiers who guarded them,

except that they got no pay unless they worked. The discipline of the German Army was applied to them. 'Obedience and military honours were required from the prisoners, and any insubordination or want of respect, even among themselves, was punished by arrest. A soldier was shot at Ingolstadt for striking a Bavarian lieutenant, and, although it was pleaded that he was drunk at the time the offense was committed, the sentence was rigorously carried out.' 'Prisoners of war,' says the German Official Manual, 'are subject to the laws and regulations of the country and the place in which they are confined and more especially to the dispositions governing the national troops of that country. They must be treated like the soldiers of the capturing state, no better, and no worse.' And again—'Officers who are prisoners are never the superiors of the soldiers of the capturing state but become the subordinates of those responsible for guarding them.' The Russian military laws were applied to the Turkish prisoners in 1877-78, except that new dispositions were made as to punishment for disciplinary offenses, to take the place of the usual forfeitures of pay or rank, which would be inapplicable to prisoners. Article 4, of the Japanese Regulations of February, 1904, subjected the Russian prisoners to 'the discipline in force in the Imperial Army,' and Article 25 provided for some one prisoner being told off to be responsible for the discipline of each 'barrack room' and to voice the demands and complaints of his fellows. A special Imperial Decree of February, 1905, provided that the prisoners should be tried by a Council of War for infractions of law and order, in the same way as Japanese troops, and authorized special punishments for breach of parole, conspiracy, etc.

"Though the *Règlement* does not state so expressly, it is understood that a prisoner may be prevented by violence, and by violence which may result in his death, if no less vigorous measures will suffice, from effecting his escape. The Brussels Project provided that 'arms may be used, after summoning, against a prisoner attempting to escape,' and the Protocol records the views of the Conference that he might be fired upon after one summons. This provision was suppressed by the first Hague Conference, not because it is improper to fire upon an escaping prisoner, but because it was deemed inexpedient to approve this extreme measure in the *Règlement*. As to whether a prisoner who has been retaken while attempting to escape may be punished therefor, there has been some difference of opinion among jurists. The American Instructions (Art. 77), while permitting the killing of a prisoner in flight, prescribe that 'neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt to escape. Bluntschli's view is the same as Lieber's. It may be a prisoner's duty to try to escape. The British Army Act (section 5(3)) punishes with penal servitude any officer or soldier who 'having been taken prisoner, fails to rejoin H. M.'s service when able to rejoin the same.' But if it is no crime to attempt to escape, it is an infraction of the disciplinary regulations of the capturing army, and for this, as for any other infraction, disciplinary punishment may be inflicted;

not because the act punished is *malum in se*, but because it is *malum prohibitum*, to use a legal distinction. The Brussels Code, adopting this view, subjected a prisoner retaken in flight to 'disciplinary punishment or a stricter surveillance,' and the Hague Règlement, going further on the lines, makes him liable to 'disciplinary punishment' and omits the alternative mentioned in the Brussels Project. The point gave rise to a lengthy discussion at the Hague. 'Finally,' says the Report, 'it was agreed, as it had been in 1874 at Brussels, that an attempt to escape should not go entirely unpunished, but that it is desirable to limit the degree of punishment which it may entail—especially, to prevent its being assimilated to desertion in face of the enemy and, as such, punished with death. * * * At the same time, it was agreed in the course of the discussion that this restriction does not apply to cases in which the escape is accompanied by special circumstances amounting, e. g., to a conspiracy, rebellion or mutiny. In such cases, as General Voigts-Rhetz observed at Brussels in 1874, the prisoners are punishable under the first part of the same Article, which says that they are 'subject to the laws, regulations and orders in force in the army of the state in whose power they are'; and this provision is supplemented by that of the same Article VIII which says down that 'any act of insubordination justifies the adoption towards them of such measures of severity as may be necessary.' War law, therefore, while allowing the killing of a prisoner to prevent his escaping, does not allow it as a punishment except where there has been a conspiracy or plot. Anything in the nature of concerted rebellion may be severely punished—even with death; but as regards ordinary attempts to escape on the part of prisoners who have not given their parole, these, as the German Manual points out, 'must be considered as manifestations of a natural desire for freedom, not as crimes. They must therefore be repressed by a restriction of the liberty allowed and by a stricter detention, but not punished by death, which should only be inflicted in the case of formal plots, by reason of their dangerous character.' Articles 7 and 8 of the Japanese Regulations of February, 1904, made prisoners re-captured while escaping liable to the summary punishments in force in the Japanese Army, but specially exempted them from any 'condemnation for a crime or delinquency by reason of their attempt to escape.' If, however, a prisoner attempted to escape after giving his word of honour not to do so, he was liable to a 'major detention' (five years' imprisonment). A breach of parole of this kind is usually treated in the same as a breach of parole after release on conditions (as to which presently) and entails, in theory at least, the liability to capital punishment."

11. The French author, Bonfils, *Droit International Public* (1914), is to the same effect (pars. 1122, 1124, 1128, 1131), and gives many citations of authorities.

12. In the absence of an express agreement with Germany it is worth while to notice that on April 26, 1918, the French and German governments made regarding prisoners of war an agreement containing the following passages:

"IV. Judicial and Disciplinary Punishments.

"a. Carrying Out of Judicial Punishments.

"Art. 34.—Whatever the nature and duration be, judicial punishments inflicted for murders or offenses perpetrated by prisoners of war during their captivity between September 1st, 1916, to April 25th, 1918, included, will be carried out in the following way:

"The condemned prisoners will be immediately removed into a special camp, the installation and regulations of which will be identical to those of the other camps. The condemned will be treated exactly as the other prisoners under reservation of the following restriction:

"a. Recreation rooms, gymnastic and play grounds, walks outside the camp, performances and concerts will be forbidden to them.

"b. Their purchases at the canteen will be limited to 25 marks or 25 francs for officers, and 10 marks or 10 francs for privates per month.

"c. They will not be allowed to work outside the camp.

"d. They will receive not more than 4 parcels a month.

"b. Carrying Out of Disciplinary Punishments.

"Art. 35.—Punishments inflicted on prisoners of war will be carried out:

"a. As regards officers:

"In Germany, according to the provisions in force for 'close arrest' (Verschaerffer Stubenarrest); in France, according to prescribed regulations concerning close arrest for officers.

"b. As regards noncommissioned officers, including sergeants;

"In Germany, according to the provisions in force for 'close arrest' called 'gelinder arrest'; in France, according to the prescribed regulations concerning 'celle':

"Art. 36.—The duration of a single punishment cannot, in any case exceed thirty days.

"When the total duration of several punishments of close arrest or cell, which would be undergone consecutively, exceeds thirty days, an interval of one week will be granted after each period of thirty days in the carrying out of the punishment. During that interval, no harsh measures must be imposed on prisoners of war.

"Art. 43 of the Berne agreement of March 15, 1918, is repealed.

"Art. 37.—The punishments referred to above must be carried out under the conditions determined in Annexes 3 and 4."

13. The recent history of the treatment of prisoners of war begins with G. O. No. 100, 1863, paragraphs 75-80 (Birkheimer on Military Government and Martial Law, 598-600); and those provisions may be traced through the Brussels convention of 1874, Articles 23-24 (Higgins' Hague Peace Conferences, 776-778), to the Hague Regulations, which, so far as relevant, have been quoted. It is unnecessary to go into the history of the subject; for the history is fully presented in the treatises which have been cited, and enough material has been quoted for the present purpose.

14. The conclusion is that, as this prisoner of war was convicted of attempting to escape, but was not convicted of conspiracy or of breaking parole, he should not be punished otherwise than with punishment of a disciplinary nature, and that disciplinary punishment should not be extended beyond close confinement and the withholding of privileges, and that action should be taken in accordance with this opinion.

[Signed] S. T. Ansell, Acting Judge Advocate General.

23. PLACE OF CONFINEMENT WHEN SENTENCE EXCEEDS SIX MONTHS

2d Ind.

War Department, J. A. G. O., July 20, 1918.—To the Adjutant General.

1. Returned. The commandant, United States Disciplinary Barracks, Fort Leavenworth, Kansas, requests information as to what disposition should be made by him of a soldier sentenced to be confined at hard labor for one year and six months, and to forfeit all pay and allowances due or to become due, without dishonorable discharge, where the United States Disciplinary Barracks, Fort Leavenworth, Kansas, has been designated by the reviewing authority as the place of confinement. Under this sentence the soldier was sent to the above mentioned place and is now being held pending further information as to his disposition. He refers to a letter of instruction issued from the office of The Adjutant General on February 12, 1918, in which he was directed to return to Camp Wheeler, Georgia, a prisoner sent to the disciplinary barracks under similar circumstances and requests general authority to take the same action in all such cases. This letter is now referred to this office for remark as to whether such general authority should be granted.

2. Paragraph 397, Manual for Courts-Martial, reads as follows:

"The United States Disciplinary Barracks at Fort Leavenworth, Kansas, or one of its branches will be designated as the place of confinement of all general prisoners * * * who are to be confined for six months or more and who are not to be confined in a penitentiary pursuant to the preceding paragraph. * * *"

Paragraph 398, Manual for Courts-Martial, reads as follows:

"A military post, station, or camp will be designated as the place of confinement of any general prisoner whose case does not come within the terms of paragraphs 396 and 397 of this section."

3. While the above quoted paragraphs do not in terms prohibit the confinement of a garrison prisoner in a disciplinary barracks, it is the opinion of this office that prisoners not sentenced to dishonorable discharge should not be held within their organizations.

4. It is therefore suggested that instructions be issued to all officers exercising general court-martial jurisdiction that the United States Disciplinary Barracks or a branch thereof will not be designated as the place of confinement unless the sentence includes dishonorable discharge, the execution of which, may, however, be suspended. Par-

ticular attention should be invited to the paragraphs of the Manual for Courts-Martial quoted above.

5. In this connection it should be noted that in the opinion of this office a sentence involving confinement at hard labor for more than six months should not be approved unless accompanied by dishonorable discharge, which may be suspended. Neither should a sentence involving confinement for more than one month be approved unless accompanied by some forfeiture of pay.

6. In the opinion of this office there is no objection to granting the commandant, United States Disciplinary Barracks, the authority requested.

[Signed] S. T. Ansell, Acting Judge Advocate General.

24. COMPENSATION FOR LABOR OF PRISONERS OF WAR

2d Ind.

War Department, J. A. G. O., July 20, 1918.—To the Adjutant General.

1. The question submitted by the Secretary of State in his letter of May 29, 1918, to the Secretary of War, referring to the letter of the Secretary of War dated October 20, 1917, is whether the United States should accede to the protest of the German Government against the non-payment of prisoners of war at Fort McPherson, Georgia, for labor connected with the upkeep of their compound.

2. The Hague Conventions of 1899 and 1907 relating to Laws and Customs of War on Land contained, in Article VI of the Regulations thereto annexed, a few provisions, which, if considered to be in force, would serve as a basis for an opinion. The provisions are (2 Malloy's Treaties, 2282):

"The State may utilize the labour of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of war.

"Prisoners may be authorized to work for the public service, for private persons, or on their own account.

"Work done for the State is paid at the rates in force for work of a similar kind done by soldiers of the national army, or, if there are none in force, at a rate according to the work executed.

"When the work is for other branches of the public service or for private persons the conditions are settled in agreement with the military authorities.

"The wages of the prisoners shall go towards improving their position, and the balance shall be paid them on their release, after deducting the cost of their maintenance."

Those provisions, though ratified by both Germany and the United States, are not now formally in force. Article II of the Hague Convention No. 4 of 1907.

3. It has been hoped that regarding prisoners of war an agreement with Germany would be included before the filing of this opinion; but as that hope seems incapable of realization, an opinion will now be given largely on the basis of the official German publication, entitled

"Kriegsbrauch im Landkriege." That document, as translated in Morgan's German War Book, 71, reads:

"Prisoners of war can be put to moderate work proportionate to their position in life; work is a safeguard against excesses. Also on grounds of health this is desirable. But these tasks should not be prejudicial to health nor in any way dishonorable or such as contribute directly or indirectly to the military operations against the Fatherland of the captives. Work for the State is, according to the Hague Regulations, to be paid at the rates payable to members of the army of the State itself.

"Should the work be done on account of other public authorities or of private persons, then the conditions will be fixed by agreement with the military authorities. The wages of the prisoners of war must be expended in the improvement of their condition, and anything that remains should be paid over to them after deducting the cost of their maintenance when they are set free. Voluntary work in order to earn extra wages is to be allowed, if there are no particular reasons against it."

4. In the United States Rules of Land Warfare, 1914, paragraphs 65, 66, the provisions quoted from the Hague Regulations are given as binding on the Armies of the United States.

5. The United States Regulations for the Employment of Prisoners of War, dated March 28, 1918, though not retroactive in effect, would properly be appealed to in behalf of German prisoners of war as indicating reasonable limits upon their liability to work. Paragraphs 7 and 8 are as follows:

"7. When employed on work that is necessary for their comfort, or for the upkeep of the prison barracks in which they are interned, prisoners will receive no compensation. When the work is done for the Government, prisoners will be paid at a rate according to the work executed; when the work is for other branches of the public service or for private persons, the conditions of and the compensation for such work will be settled in agreement between representatives of said branches or persons and The Adjutant General of the Army.

"8. The wages of the prisoners shall go toward improving their position, and the balance shall be paid them on their release, after deducting the cost of their maintenance."

The 12th paragraph says that "when prisoners are employed on work for the Government," "the rates of pay shall be fixed by the Secretary of War, according to the work executed;" and the 13th paragraph gives details regarding work done for private persons.

6. The work done by these prisoners of war appears to have been the construction of new quarters to be occupied by themselves and by other prisoners of war. The construction of new quarters cannot fairly be called work necessary for the comfort of the workers or for the upkeep of the barracks in which they are interned; and consequently there should be compensation in this case.

[Signed] S. T. Ansell, Acting Judge Advocate General.

INDEX

[THE FIGURES REFER TO PAGES]

ABSENCE WITHOUT LEAVE, EFFECT UPON ALLOTMENT, 783.

ACCRUAL OF WAR RISK BENEFITS FOR INDUCTED MEN, 729.

ADJUTANTS GENERAL OF STATES, ETC., 423.

AGENCY,

How affected by war, 323.

To bind United States, 264.

ALIEN ENEMY,

Arrest and detention of, 643.

Defined, 665.

ALIENS,

Registration of, 595.

Liability to military service, 628, 650.

Right to pursue occupation, 661.

Burden of proving alienage, 669.

ALLOTMENT,

Effect on, of absence without leave, 783.

Soldiers in non-pay status, 786.

Affected by discharge, 798.

During illness due to misconduct, 708.

APPOINTMENTS, ORIGINAL TO BE PROVISIONAL, 403.

APPROPRIATIONS,

Urgent Deficiencies, 562.

Army, 587.

ARMS, RIGHT TO BEAR, 108.

ARMY ORGANIZATION AND ADMINISTRATION, 335.

ARREST, 22.

By civil officer for desertion, 697.

Wrongful, by militiaman, 246.

ARTICLES OF WAR,

Provisions of, 8.

Militiaman not subject to, 118.

Amendment to, 593.

ASSIGNMENT BY OFFICER OF SALARY, 369.

ATTEMPT TO CAUSE INSUBORDINATION, 638.

BRITISH CONVENTION, 474.

Notes relating to, 479.

CALL TO MILITARY SERVICE, RESOLUTION, 469.

CANADIAN CONVENTION, 476.

CANTONMENT SITES, 716.

[The figures refer to pages]

- CAR SERVICE ACT, 481.
- CARRIERS, FEDERAL CONTROL ACT, 575.
- CHAPLAINS, 446.
- CITIZENSHIP,
 - Of state and of United States, 76.
- CIVIL ACTION BY SOLDIER, 775.
- CIVIL LIABILITY OF OFFICER,
 - For corporal punishment administered to enlisted man, 201.
 - For property seized, 207.
 - For acts done at his command, 215.
- CIVIL LIABILITY OF SOLDIER,
 - Obedience to orders as justification, 216.
- CIVIL RELIEF ACT, 563.
- CIVIL WAR,
 - Altered status of states in insurrection, 181, 227.
- CIVILIAN CLAIM FOR DAMAGES DONE BY SOLDIERS, 244, 725.
- CIVILIAN EMPLOYÉS, 729.
- COMMANDING OFFICER MAY AID CIVIL AUTHORITIES, 694.
- COMMERCE WITH ENEMY,
 - President may stop or permit on condition, 181.
- COMMUNICATIONS, CONTROL OF, 602.
- COMPULSORY SERVICE, 617, 654.
- CONDEMNATION OF PROPERTY, 601.
- CONFEDERATE STATES DEEMED ENEMY COUNTRY, 227.
- CONGRESS' POWER,
 - Constitutional provisions, 6.
 - To authorize trial by military commission, 122.
 - Statutes paramount over executive orders, 192.
 - To compel service in Army and Navy, 617.
 - To enact Articles of War, 641.
- CONSPIRACY TO HINDER REGISTRATION, 626, 672, 677.
- CONSTITUTIONAL PROVISIONS, 6.
- CONTRACTS,
 - How affected by war, 301, 314, 320, 323, 326.
- CONTRACTS OF UNITED STATES,
 - Formalities in certain cases, 276, 290, 608.
 - Officers' interest in, 696.
 - Government reimbursement of personal injury, 706.
 - Cancellation for hardship to contractor, 721.
 - Infringement of patent rights, 723.
 - Authority of Secretary of War to make, 261.
 - Usual rules applied to contract of United States, 264, 271.
 - May dispense with advertising, 270.
 - Recovery, quantum meruit, 276, 290.
- COUNTERFEITING GOVERNMENT SEAL, 495.
- COURTS-MARTIAL,
 - Kinds of, 10.
 - Composition, 11.
 - By whom appointed, 11.
 - Jurisdiction, 12.
 - Procedure, 12.
 - Limitations upon prosecutions, 18.

[The figures refer to pages]

COURTS-MARTIAL (Continued),

- Punishments, 17.
- Action by appointing or superior authority, 18.
- State's power to provide, 59.
- Volunteer Army man cannot be tried by Regular Army men, 339.
- In National Guard, 434.
- Review by Judge Advocate General, 604.
- Jurisdiction of prisoners of war, 804.
- Effect of error, 805.
- Jurisdiction of divisional and departmental commanders, 806.
- Procedure under G. O. 7, 806.
- Duration of arrest, 811.
- Interim investigation, 813.
- Larceny, penalty, 814.
- Procedure, 816.
- Officer preparing charge as a member of the court, 817.
- Penitentiary sentence for civil offenses, 821.
- Charge laid under wrong A. W., 822.
- Summary court jurisdiction, 823.
- Charges under A. W. 96, 824.
- Penitentiary sentences, 825.
- Escape from confinement charge, 827.
- Military persons purchasing liquor, 829.
- Summary court, power to reduce rank, 830.
- Errors in record, 831.
- Offense of disobedience of orders, 834.
- Authority to appoint, 837.
- Punishment of prisoners of war, 839.
- Place of confinement, 846.

COURTS OF INQUIRY, 28.

CRIMINAL LIABILITY OF SOLDIER,

- Soldiers invading one state at the behest of the subordinate military authority of their own state are liable under the criminal laws of the state invaded, 75.
- Officers and enlisted men, 235.

DELIVERY OF SOLDIER TO CIVIL AUTHORITIES, 694.

DENTAL CORPS, OFFICERS, 767, 771.

DESERTION, 21, 647.

- Arrest for by civil officer, 697.
- Forfeiture of pay, 743.
- Effect on allotment for Liberty Bonds, 774.

DISCHARGE,

- For disloyalty, 746.
- Without trial, 752.

DISLOYALTY AS CAUSE FOR DISCHARGE, 746.

DISRESPECT, 21.

EFFICIENCY BOARDS, 790.

EMERGENCY SHIPPING FUND ACT, 482.

ENLISTED MEN,

- Criminal liability of, 235.
- Pay of, 408.
- Final discharge of, 409.
- Transfers of, 693.
- Discharge when convicted of felony, 712.

ENLISTED RESERVE CORPS, 418.

[The figures refer to pages]

ENLISTMENT,

- State cannot procure release of man who enlisted while under age, 90.
- Creates status, 377.
- By one over age limit, 377.
- Parents' consent, 382.
- In Regular Army, 407.
- In National Guard, 425.
- Of minors, 787.

ESPIONAGE ACT, 484.

- Amended, 500.
- Held constitutional, 631.
- Prosecution under, 631, 672, 677.

ESTATES OF DECEDENT SOLDIERS, 776.**EXECUTIVE CO-ORDINATION ACT, 586.****EXECUTIVE POWERS, 163.****EXECUTIVE ORDERS,**

- No. 2877. Law officers to act under Department of Justice, 606.
- No. 3744. Formalities required in certain contracts, 606.

EXEMPTION,

- Members of certain religious sects, 617, 647.
- Power of district exemption board, 650.

EXPORTS,

- Certain, unlawful, 493.
- Seizure of arms intended for, 491.

EXTRA COMPENSATION FOR EXTRA WORK, 750.**FOOD AND FUEL CONTROL ACT, 504.****FOREIGN CLAIMS ACT, 583.****FOREIGN COMMERCE, INTERFERENCE WITH, 488.****FOREIGN RELATIONS, DISTURBANCE OF, 493.****FORFEITURE OF PAY AS AFFECTING ALLOTMENTS, 738, 774.****FORFEITURE OF PAY BY DESERTER, 743.****FRAUDULENT ENLISTMENT, 20.****FURLOUGH ACT, 575.****GENERAL ORDERS,**

- No. 7. Relating to review of death or dismissal sentence, 604.
- No. 50. Prohibiting enlistment for serving foreign country, 608.
- No. 66. Enlisted personnel, in J. A. G.'s Department, 610.
- No. 73. The United States Army, 613.
- No. 78. Appointment of officers, 614.
- No. 83. War risk insurance questions, 616.

GENESIS OF ANGLO-AMERICAN MILITARY LAW, 1.**GOVERNMENT LIABILITY FOR DAMAGE CAUSED BY MILITARY OPERATIONS, 715.****GOVERNOR'S POWER TO DECLARE MARTIAL LAW, 135, 148.****GROUP PAY STOPPED FOR TORTS, 717, 773.****HABEAS CORPUS,**

- Suspension of, 122, 135, 148.
- State cannot release man from United States Army by, 90.

HISTORY OF MILITARY LAW, 1, 8.

[The figures refer to pages]

IN THE FIELD, MAN ON TRANSPORT DEEMED, 641.

INDUCTED MEN,

Transfer to Enlisted Reserve Corps, 735.

Eligible for war risk insurance, 744.

INDUCTION, EFFECT OF AS TO PAY, 802.

INTOXICATING LIQUORS, 611.

JURISDICTION OF OFFENSE BY SELECTIVE EN ROUTE TO CAMP, 727.

LAND CONDEMNATION ACT, 502.

MARINE CORPS,

Status of, 335.

Service in, counts toward longevity pay, 335.

MEDALS OF HONOR, 441, 588.

MILITARY COMMISSION, POWER OF, 122, 135.

MILITARY GOVERNOR, APPOINTMENT OF, DOES NOT CHANGE LAWS OF THE STATE, 133.

MILITARY JURISDICTION OF CIVILIAN EMPLOYÉS, 729.

MILITARY POLICE, JURISDICTION OVER CIVILIANS, 820.

MILITARY POWER OF STATE,

Organization and control of militia, 56.

Court-martial by state authority of man called to service of United States who did not obey the call, 59.

Has no power to wage war or make treaties, 74.

May adopt Articles of War and subject its militiamen to same, 110.

To declare martial law, 135, 148.

To establish military commission, 138.

To raise Home Guard, 689.

MILITARY POWER OF UNITED STATES,

Constitutional provisions, 6, 7.

Supreme over state power, 90.

Control over military reservations, 97.

To transport troops through states, 132.

Compulsory service, 617.

MILITARY RESERVATIONS, 90.

MILITIA, 421.

State may organize, 689.

MILITIAMAN,

Not subject to Articles of War, 118.

Distinguished from Army and Navy men, 118.

Civil liability of, 246.

MINOR,

Discharge when drafted, 702.

Induction when falsely registering as over age, 709.

Enlistment when under 18 without parents' consent, 714, 787.

MISCELLANEOUS CRIMES, 25.

MUTINY ACT, 1.

NATIONAL DEFENSE ACT, 384.

Amendment to, 597.

NATIONAL GUARD,

Filling of vacancies when drafted into federal service, 427.

Leaves of absence for certain government employés, 428.

[The figures refer to pages]

NATIONAL GUARD (Continued).

- Militia Bureau of the War Department, 428.
- Inspections, 432.
- Encampments and maneuvers, 432.
- When subject to laws of Regular Army, 434.
- System of courts-martial, 434.
- Pay for officers, 435.
- Pay for enlisted men, 436.
- When drafted into federal service, 437.
- Applicable to land forces only, 439.
- Loses its identity in United States Army, 613.
- Drafting of, 691.
- Federal status of, as to pay, 781.

NAVAL EMERGENCY FUND ACT, 458.**NEUTRALITY, ENFORCEMENT OF, 488.****NONMAILABLE MATTER, 631.****OFFICERS,**

- Civil liability for corporal punishment administered to enlisted man, 201.
- Liability for property seized, 207, 219.
- Liability for acts commanded, 215.
- Rank by brevet and otherwise, 350.
- Resignation, 351.
- Dismissal by President, 351, 355.
- Has no vested interest or contract right, 362.
- Cannot assign unearned salary, 369.
- Promotions, 372.
- Cannot have leave without pay, 374.
- Vacancies and appointments, 614.
- Interest in government contract, 696.
- Transfer of, 698.
- Discharge of, temporarily promoted, 731.
- Effect of staff commission on line commission, 755.
- Discharge from temporary commission, 763.
- Temporary and permanent commissions, 794.
- Mileage for testifying before civil courts, 797.
- Not amenable to laws of enemy country, 227.
- Criminal liability, 235.
- Not civilly liable for acts of subordinate, 244.

OFFICERS' RESERVE CORPS, 411, 413.**— ORDERS AS JUSTIFICATION FOR ACTS OF SOLDIERS, 216, 217, 226, 235, 246.****PARTNERSHIP DISSOLVED BY WAR, 303.****PASSPORTS, 494.****PERSONS SUBJECT TO MILITARY LAW, 647.****PLUNDER PROHIBITED, 225.****PREFERENCE FOR MILITARY TRAFFIC, 447,****PRESIDENT'S POWERS,**

- Constitutional provisions, 6.
- To issue neutrality proclamation, 52.
- To call out militia, 163.
- Commander in chief, 165, 188.
- To establish rules, 168.
- Can invade hostile country, 170.
- Can institute provisional government, 174, 179.
- May stop or condition commerce with enemy, 181.
- Cannot issue orders in conflict with statutes of Congress, 189.

[The figures refer to pages]

PRESIDENT'S POWERS (Continued).

- May act as executive through heads of departments, 192.
- Review of courts-martial must be performed personally, 192.
- Power to dismiss officers, 351, 355.
- To enlist men outside draft age, 600.
- To increase drafted army, 600.
- Under Selective Draft Act, 647.

PRIORITY SHIPMENT ACT, 502.

PRISONERS OF WAR.

- Punishment of, 839.
- Compensation for labor, 847.

PROPERTY.

- Right to seize, 217, 219.
- Confiscation of, 225.
- Destroyed in military operations, 281.

PROSTITUTION PROHIBITED NEAR CANTONMENTS, 596.

PROTECTION OF THE UNIFORM, 443.

PROVISIONAL GOVERNMENT.

- President may institute, 174, 179.

PURCHASE OF MILITARY SUPPLIES, 439.

RE-ENLISTMENT, 411, 748.

REFUND OF DISCHARGE PURCHASE MONEY TO DRAFTED MAN, 780.

REGISTRATION, RESOLUTION CALLING FOR, 470.

REGULAR ARMY.

- Distinguished from Volunteer Army, 339.
- Composition of, 384.
 - Brigades, divisions, etc., 385.
- General officers of the line, 385.
- General Staff Corps, 386.
- Adjutant General's Department, 388.
- Inspector General's Department, 388.
- Judge Advocate General's Department, 388.
- Quartermaster's Corps, 389.
- Medical Department, 390.
- Corps of Engineers, 393.
- Ordnance Department, 394.
- Signal Corps, 394.
- Bureau of Insular Affairs of the War Department, 396.
- Chaplains, 396.
- Veterinarians, 396.
- Composition of Infantry units, 398.
 - Cavalry units, 399.
 - Field Artillery units, 400.
 - Coast Artillery Corps, 401.
 - Porto Rico Regiment of Infantry, 402.
 - Loses its identity in United States Army, 613.

REGULAR ARMY RESERVE, 409, 410.

RELIGIOUS LIBERTY.

- Not violated by certain exemptions from service, 617.

REMOVAL OF RESERVE OFFICERS FROM INTERNMENT TO OFFICERS' CAMP, 798.

RESERVE OFFICERS' TRAINING CORPS, 414.

- Detail of officers for, 445.

RESIDENCE OF SOLDIER, 112.

[The figures refer to pages]

SCHOOLS AND COLLEGES, MILITARY INSTRUCTION AT, 421.

SEARCH WARRANTS, 496.

SECRET SERVICE,

President may employ, 188.

SECRETARY OF WAR,

Duties, 34.

Rules promulgated by, deemed to come from president, 170.

Power to contract, 261, 264.

Injunction against, 372.

SELECTIVE SERVICE ACT, 460.

Amendments thereto, 469, 471.

Held constitutional, 617, 647, 654.

SHIPPING,

Anticipation of war as excuse for failure to deliver, 326.

SHIPPING BOARD ACT, 447.

Amendment thereto, 455.

SLAVIC LEGION, 588.

SOLDIER,

Obedience to orders as justification for acts, 216, 217, 226, 246.

Prohibited from civil employment, 411.

Claims of for loss of private property, 591.

Delivery of to civil authorities, 694.

Right to innkeeper's services, 720.

Civil liability, 725.

Surgical operation on, 758.

Estates of decedent soldiers, 776.

Not amenable to laws of enemy country, 227.

Wills of, 293.

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT, 563.

STATE'S CIVIL JURISDICTION OVER SOLDIER,

Cannot tax salary, 67.

Soldier on furlough, 84.

Cannot release soldier from United States on habeas corpus, 90.

Civil court cannot interfere with court-martial, 111.

United States military authority paramount, 158.

Delivery to, 694.

To arrest for desertion, 697.

Duty of military person to testify in civil court, 705.

STATUTE OF LIMITATIONS AFFECTED BY WAR, 296, 310.

STATUTORY PROVISIONS,

Mutiny Act, 1.

Revised Statutes of United States, 34.

Criminal Code, 43.

Restriction upon use of military force, 47.

Claims for property lost or destroyed, 47.

Qualifications for enlistment, 48.

Composition of national forces, 48.

Composition of Regular Army, 49.

Establishment and duties of General Staff, 49.

Composition of and rules relating to militia, 50.

Military forces to have right of way, 51.

Discrimination against persons wearing uniform, 51.

President empowered to issue neutrality proclamation, 52.

Disciplinary barracks, 52.

Contracts to be in writing, 54, 55.

[The figures refer to pages]

STATUTORY PROVISIONS (Continued),

National Defense Act, 384.
 Reserve Officers' Training Corps, 445.
 Chaplains, 446.
 Military traffic, 447.
 Shipping Board Act, 447, 455.
 Naval Emergency Fund Act, 458.
 War resolution, 459.
 Selective Service Act, 460.
 Amendments to Selective Service Act, 469, 471.
 Resolution calling to military service, 469.
 Resolution providing for registration, 470.
 Car Service Act, 481.
 Emergency Shipping Fund Act, 482.
 Espionage Act, 484.
 Land Condemnation Act, 502.
 Priority Shipment Act, 502.
 Food and Fuel Control Act, 504.
 War Risk Insurance Act, 516.
 Resolution relating to war risk insurance, 531.
 War Risk Insurance Act amendments, 532, 542.
 Trading with the Enemy Act, 543.
 Appropriations to supply urgent deficiencies, 562.
 Civil Relief Act, 563.
 Furlough Act, 575.
 Federal Control of Carriers Act, 575.
 Foreign Claims Act, 583.
 War Materials Destruction Act, 584.
 Executive Co-ordination Act, 586.
 Army Appropriation Act, 587.
 Control of Communications Act, 602.

SURGICAL OPERATION ON SOLDIER, 758.

TELEGRAPHS AND TELEPHONES, CONTROL OF, 602.

TRADING WITH THE ENEMY ACT, 543.

TRAINING CAMPS, 418.

TRANSFER OF UNITED STATES PROPERTY FROM ONE BUREAU TO ANOTHER, 727.

TRANSFERS,

Enlisted men, 695, 735.
 Officers, 698.

UNITED STATES ARMY, 613.

UNITED STATES CANNOT BE SUED WITHOUT ITS CONSENT, 260.

USE OF MAILS, 499.

VESSELS IN PORTS OF THE UNITED STATES, 487.

VOLUNTEER ARMY,

Distinguished from regular army, 339.

WAR DEPARTMENT DISPOSAL OF UNITED STATES PROPERTY BY GIFT, 719.

WAR DISTINGUISHED FROM INSURRECTION, 156.

WAR MATERIALS DESTRUCTION ACT, 584.

[The figures refer to pages]

WAR OFFENSES, 24.

WAR RESOLUTION, 459.

WAR RISK INSURANCE ACT, 516.

Resolution authorizing granting of insurance under, 531.

Amendments to, 532, 542.

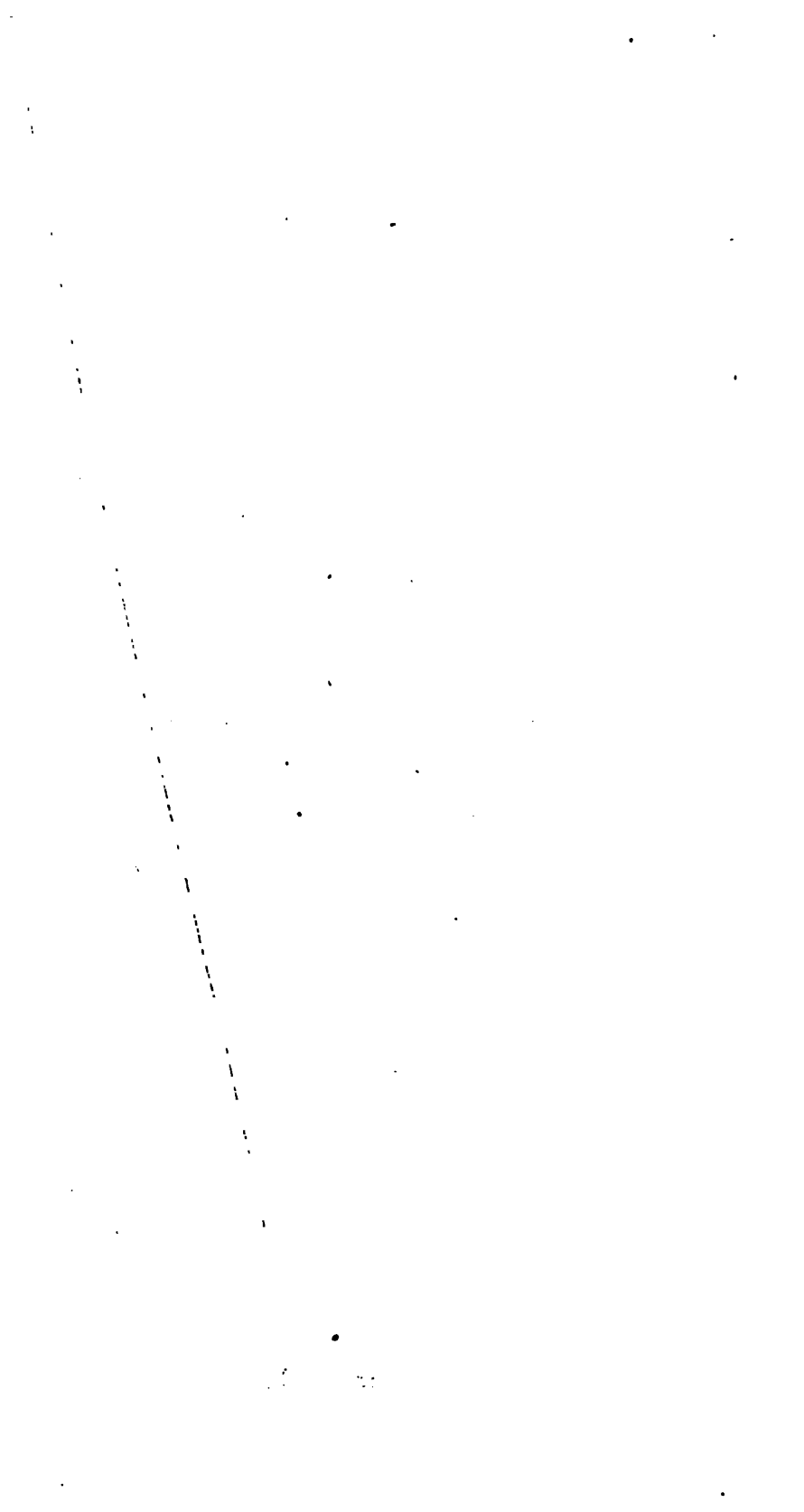
Questions arising under, to be decided by officer of Judge Advocate General's Department, 616.

Accrual of benefits for inducted men, 729.

Forfeiture of pay as affecting allotments under, 738.

Eligibility by inducted men for benefits of, 744.

WILL OF INFANT SOLDIER, 293.



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